(21,708.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 234.

THE UNITED STATES OF AMERICA *EX RELATIONE* LUCY ANN TURNER, DIXEY GRISWELL, AND MAUDE TURNER, WILLIE TURNER, ANNA TURNER, AND FLORENCE TURNER, MINORS, SUING BY THEIR MOTHER AND NEXT FRIEND, LUCY ANN TURNER, PLAINTIFFS IN ERROR,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1910.

1 In the Court of Appeals of the District of Columbia.

No. 1926.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER et al., Appellants,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior.

Supreme Court of the District of Columbia.

At Law. No. 49891.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Petitioners,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition for Writ of Mandamus.

Filed October 29, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49891.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Petitioners,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Mandamus.

Your petitioners respectfully represent:

2 1. That they are citizens of the United States and freedmen citizens, members and residents of the Creek Nation in the Indian Territory and Creek freedmen by blood.

2. That the Respondent, James Rudolph Garfield, is a citizen of the United States, temporarily residing in the District of Columbia, and is an officer of the Government of the United States and Secretary of the Interior in said Government, and is sued as such, having succeeded on March 5, 1907, as said Secretary of the Interior the Ethan A. Hitchcock hereinafter mentioned.

3. That as heretofore stated, respondent's immediate predecessor in office as Secretary of the Interior was Ethan A. Hitchcock, to whom as said Secretary of the Interior was committed by Congress under certain laws hereinafter referred to, the duty of final action on applications for citizenship in the Five Civilized Tribes in the Indian Territory, or of freedmen citizenship in certain of said tribes, including the Creek Tribe, and of approving the enrollment of those applicants whom he should deem entitled to be placed on the final rolls of members or citizens of any one of the Five Civilized Tribes, the Creek Tribe of Nation being one of the said Five Civilized Tribes.

4. That by certain treaties and agreement- between the United States and the Creek Nation of Indians, the Creek Nation ceded to the United States the lands granted to it by treaties with the United States east of their present home in exchange for the lands whereon said Nation now resides. That by the treaty between the United States and the Creek Nation of Feb. 14, 1833, proclaimed April 12, 1834 (7 Stats. 417) the lands occupied by the Creek Nation, and in which lands your petitioners as freedmen citizens had an equal undivided interest, were given or granted to the said Creek Nation by the United States in fee simple. That Article 3 of the said Creek treaty aforesaid provides as follows:

"Article 3. The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States— and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

That the lands referred to are the same lands whereon the Creek Nation now resides, and in which petitioners claim an undivided interest.

That by the treaty of June 14, 1866, proclaimed August 11, 1866, your petitioners and other Creek freedmen were given an undivided interest in the lands of the Creek Nation, Article 2 of said treaty providing as follows:

"The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch as there are among the Creeks many persons of African descent who have no interest in the soil, it it stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been
3 thus residing in said country, may return within one year from the ratification of this treaty, and their descendants and

such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe."

5. That said Indians and their heirs and the Creek freedmen residing among them and entitled to share in the tribal lands and funds under the treaty of 1866 referred to in the 4th paragraph hereof have not become extinct and have not abandoned the said land or any part thereof, but, on the contrary, the reversionary interest of the United States in said lands has been terminated and surrendered to said Indians and Creek freedmen by certain Acts of Congress, treaties and agreements having for their purpose the division in severalty of the lands of the Creek Nation among the Creek Indians and freedmen members and citizens of said Creek Tribe and their descendants. That your petitioners are lawful descendants of a freedwoman, long recognized as a citizen or freedman member of said Creek Tribe, and your petitioners aver that they have heretofore been recognized and adjudged by the Secretary of the Interior to be freedmen members of said Creek Nation, and as such your petitioners have a vested right to have a lawful allotment of land in the Creek Nation allotted to them and to receive an equal undivided distributive share in the funds of the Creek Nation.

Your petitioners attach hereto, and pray that the same may be read as a part hereof under the designation "Exhibit A-1," a true copy of the order and decision unappealed from of the Commission to the Five Civilized Tribes holding your petitioners entitled to a vested interest in the lands and funds of the Creek Nation.

6. That under the provisions of various acts of Congress, a Commission to the Five Civilized Tribes was created for the purpose among other things of making agreement with each of the Five Civilized Tribes for the division in severalty among their citizens or members of the lands held by them in common, of enrolling under the direction and approval of the Secretary of the Interior the members or citizens of every one of the Five Civilized Tribes, and of allotting in severalty in fee simple to the members of the Creek Nation the lands held by said Nation as hereinbefore forth. That under the provisions of said acts of Congress of agreements effected in accordance therewith and of treaties between the United States and said Indian tribes, rolls of members of each of the tribes were directed to be prepared by said Commission under the supervision of the Secretary of the Interior from time to time, and it was provided that when the enrollment of any person as a member of any one of the Five Civilized Tribes should be approved by the Secretary of the Interior, his name should be placed on the final roll of said tribe, and he thereby should become and be a member of the said tribe of Nation and entitled to an allotment in the Creek Nation of 160 acres of average allotable land in said Nation, and to the other rights and privileges common to citizens of said Nation.

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That by the Act of June 10, 1893 (29 Stats. 321-29) it was provided:

"That the rolls of citizenship of the several Tribes as now existing are hereby confirmed."

And that either the Commission to the Five Civilized Tribes or the legally constituted court or committee on citizenship of the several tribes should determine after hearing the applications of persons claiming right to be admitted and enrolled in the several Nations, and either the Tribe or any person aggrieved by any decision of the tribal authorities or the Commission to the Five Civilized Tribes to have the right of appeal within a limited time from such decision to the United States District court, whose decision should be final, and the rolls thus prepared, it was provided,

"shall be and are hereby made rolls of citizenship of said Nation or Tribe."

and should be filed with the Commissioner of Indian Affairs.

"To remain there for use as the final judgment of the duly constituted authorities."

That by the Act of June 7, 1897 (30 Stats. 62-84) it was provided that the words "rolls of citizenship" as used in the Act of June 10, 1896,—

"shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the Nation and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added thereto by the council of such nation, the duly constituted courts thereof, or the Commission under the Act of June 10, 1896."

It was provided that all other names appearing upon such rolls, and not confirmed by the Act of June 10, 1896, as herein construed, might within six months from the passage of the Act be stricken from the rolls—

"where the party affected shall have 10 days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such Nation.

"Provided however, that the person so stricken from the rolls should have a right of appeal to the United States District Court."

That by the Act of June 23, 1898 (30 Stat., 495-503) it was provided:

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made.

* * * * * * *

"The roll of Creek freedmen made by J. W. Dunn under authority of the United States, prior to March 14, 1907, is hereby
5 confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all

descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

* * * * * * *

"The rolls so made when approved by the Secretary of the Interior shall be final and the persons whose names are found thereon with their descendents thereafter born to them, with such persons as may intermarry according to the tribal laws shall alone constitute the several Tribes which they represent."

That by the Act of May 31, 1900 (31 Stats., 221-236) it was provided that the Commission

"shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe of the Indian Territory who has not been recognized as a citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior."

That by the Act of March 3, 1901 (31 Stats. 1058-1077) it was provided:

"The rolls made by the Commission to the Five Civilized Tribes when approved by the Secretary of the Interior shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said Tribes or either of them for closing said rolls, but upon failure to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

That by the Act of March 8, 1901 (31 Stats. 861) it was provided:

"3. All lands of said Tribe shall be allotted among the citizens of the Tribe by said Commission so as to give each an equal share of the whole in value as nearly as may be, in manner following:

There shall be allotted to each citizen 160 acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him."

That by said Act it was further provided:

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribes shall be made and to no other persons."

All persons who were living on April 1, 1899, entitled to be enrolled under the Act of June 28, 1898, it was provided, should be enrolled, and if any such citizen had died since that time or should hereafter die before receiving his allotment, it was provided that his heirs should receive the same.

That by the supplemental Creek Agreement of June 30, 1902 (32 Stats. 500) it was provided in Section 16:

"Selections of homesteads for minors, prisoners, convicts,
6 incompetent and aged and infirm persons who cannot select for themselves may be made in the manner provided for the

selection of their allotments, and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him."

That by the Act of March 3, 1905 (33 Stats. 1084-50) it was provided that the Commission to the Five Civilized Tribes should conclude its work on or before July 1, 1905, and cease thereafter to exist.

That by the Act of March 3, 1905 (33 tSats. 1084-50) it was provided that the Secretary of the Interior should complete the unfinished business of the Commission to the Five Civilized Tribes, and there was conferred on him all the powers heretofore granted to the said Commission.

That by the Act of April 26, 1906 (34 Stats. 137), it was provided that no person should be enrolled unless application for enrollment was made prior to December 1, 1905, and the rolls of citizenship were required to be completed by March 4, 1907.

7. That under and in accordance with the provisions of these several acts the Commission to the Five Civilized Tribes and the Secretary of the Interior undertook the investigation of the rights of parties applying for enrollment, and prepared rolls on which were placed persons held entitled to be enrolled, and said rolls were by the Secretary of the Interior finally approved, the names of your petitioners being, as hereinafter set forth, placed on said final approved rolls. That rules and regulations were provided for the proper determination of the rights of parties to enrollment, and these rules and the practice of the Commission provided, as your complainants are informed and allege, that notice should be given to all parties of all steps affecting their rights, and all proceedings looking to the enrollment of applicants were conducted in accordance with the principles of the common law, so far as applicable and not inconsistent with the provisions of the statutes hereinbefore set forth. That your petitioners made application for enrollment and their cause came on for hearing before the Commission to the Five Civilized Tribes and testimony in the cause was taken in the month of July, 1904. That your petitioners employed as their attorneys, J. G. Lieber and E. L. Merrick, attorneys practicing before the said Dawes Commission, and each of whom, as your petitioners are informed and believes, are intermarried citizens of the Creek Nation, and as such entitled to rights in the said Nation. That your petitioners throughout the proceedings leading up to their final enrollment were represented, so far as they have any information, by the said Lieber and the said Merrick. That when the testimony of your petitioners was taken, E. L. Merrick had his appearance entered as attorney for applicants, and M. L. Mott appeared as attorney for the Creek Nation. That after all the testimony which either side desired to offer had been adduced, the Commission to the Five Civilized Tribes rendered a decision holding your petitioners entitled to enrollment in the Creek Nation as Creek freedmen. (A true copy of said decision is attached hereto marked "Exhibit A-1" and is prayed to be read as a part hereof.) That after said decision was rendered by the Commission to the Five Civilized Tribes, the attor-

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ney for the Creek Nation was duly and regularly advised of said decision. (A true copy of the notification to the attorney for the Creek Nation of the decision of the Commission to the Five Civilized Tribes is attached hereto marked "Exhibit A-2" and is prayed to be read as a part hereof.)

That subsequently to the decision herein referred to, and the notification referred to, the names of your petitioners were forwarded by the Commission to the Five Civilized Tribes in regular and due course to the Secretary of the Interior for enrollment on the final approved rolls of freedmen citizens or members of the Creek Tribe or Nation.

That no appeal was taken from the aforesaid decision of the Commission to the Five Civilized Tribes by the Creek Nation, and no objection introduced to the claim on behalf of your petitioners that they were and of right should be declared to be freedmen citizens or members of said Creek Nation. That the enrollment of your petitioners was then duly, regularly and lawfully approved by the then lawful incumbent of the office of Assistant Secretary of the Interior, said Assistant Secretary of the Interior being duly and regularly authorized by the Secretary of the Interior to sign said roll in his, the said Secretary of the Interior's name and stead, and the names of your petitioners were duly entered on the regularly authenticated and approved final rolls of freedmen citizens of the Creek Nation as follows:

Creek Roll, Creek Freedmen.

* * * * * * *

No.	Name.	Age.	Sex.	Blood.	Census card No.
5650	Turner, Lucy Ann	37	F	....	1882
5651	Turner, Maude	12	F	....	1882
5652	Turner, Anna	18	F	....	1882
5653	Turner, Willie	16	M	....	1882
5654	Turner, Florence	9	F	....	1882
5655	Griswell, Dixey	19	F	....	1882

* * * * * * *

(*The marks indicate other names were on said roll.)

That said final roll was on, to wit, the 16th day of June, 1906, duly and regularly approved by the then lawful encumbent of the office of Assistant Secretary of the Interior, as is evidenced by the following genuine and regular notation at the bottom of said approved final roll:

Department of the Interior,
Washington, D. C., June 16, 1906.
Approved:

JESSE E. WILSON,
Assistant Secretary.

L. R. S.

8 8. That sometime subsequent to the final enrollment as hereinbefore set forth by your petitioners, the attorneys for your said petitioners became the one assistant attorney for the Creek Nation, and charged as such with the special duty of keeping freedmen off the Creek Rolls, and the other of said attorneys became a law clerk or attorney for the Commission to the Five Civilized Tribes in the Creek Enrollment Division. That thereafter the said attorneys in violation of the duty incumbent upon them as attorneys for your petitioners, and contrary to the true facts, one or the other of them falsely stated to the attorney for the Creek Nation that your petitioners were not entitled to enrollment, and that their enrollment had been procured by fraud. That under the rules of the common law, as your petitioners are informed and advised, the attorneys for your petitioners, as aforesaid, neither could be heard in nor permitted to allege matters which had been stated to them by any or all of your petitioners as their clients, without the consent and permission of your petitioners, and that even if true, they could not be heard or permitted to assert that your petitioners, their former clients, had stated to them they would or could prove their case or were proving their case by or thourgh fraudulent means. Your petitioners further allege that having been duly placed upon the approved final rolls by the Secretary of the Interior, that all jurisdiction in the said Secretary of the Interior over the matter of the enrollment of your petitioners ceased and determined, and that thereafter the said Secretary of the Interior was without any authority or jurisdiction to remove the names of your petitioners from the said final rolls of the Creek Nation.

That notwithstanding these rules of the common law, and without any notice to your petition-, and these rules and principles of law and the lack of jurisdiction in the Secretary of the Interior after the final enrollment of your petitioners, the attorney for the Creek Nation, M. L. Mott, was permitted to, and did, move to reopen the matter of the final enrollment of your petitioners. Your petitioners further state that the said motion to reopen the case was not in accordance with the rules and regulations and practice of the Commission to the Five Civilized Tribes and the Secretary of the Iuterior, in that the said motion did not set forth the facts or any newly discovered evidence. (A copy of the said motion to reopen is attached hereto, marked "Exhibit A-3," and is prayed to be read as a part hereof.)

That sometime thereafter, and without any notice to your petitioners an affidavit was filed, signed by Edward Merrick one of the former attorneys of your petitioners, and at that time an attorney or law clerk in the Creek Enrollment Division of the Dawes Commission, alleging that your petitioners' enrollment had been procured by means of false testimony, and further alleging that your petitioners had abandoned their case as the attorney was informed and had left the Indian Territory for Texas. Your petitioners allege that this affidavit is wholly untrue and false. That your petitioners never as a matter of fact did inform the said Merrick or the said Lieber or any other person whosoever that they had or could procure

9 false testimony in their behalf. Your petitioners allege that they did not procure any false testimony in their behalf. They further allege that they never did abandon their case or claim to citizenship, and they further allege that the affidavit is wholly untrue and false, wherein it alleged that petitioners had removed to the State of Texas, the fact being that ever since the year 1901 your petitioners had lived at Wagoner, I. T., about 14 miles from Muskogee, where the said Merrick lived, and where was the chief office of the Commission to the Five Civilized Tribes, which place was known to the said Merrick and to the said Commission to the Five Civilized Tribes to be the residence of your petitioners.

That your petitioners received no notice whatsoever of the motion to reopen their case, nor of the affidavit filed by the said Merrick, and had no opportunity to reply thereto prior to the time when they learned that the case of your petitioners had been reopened.

That your petitioners not hearing from their application for enrollment, and the fact of their final enrollment not being communicated to them, they employed W. D. Halfhill as their attorney to ascertain the situation and status of their case, and finally learned that they had been enrolled, but did not receive notification of the same until too late for them to select allotments as provided by law, for the reason that notification of their final enrollment was deferred or delayed until your petitioners were likewise advised and informed that their enrollment had been set aside, and their case reopened. That thereafter your petitioners employed W. D. Halfhill as their attorney to represent them as counsel, but without waiving any right of your petitioners under the final enrollment of the Secretary of the Interior as hereinbefore set forth. That the Creek Nation employed as the attorney who should conduct the proceedings against them the J. G. Lieber aforesaid who theretofore had been the attorney for your petitioners. That the said J. G. Lieber gave no notice to your petitioners of the time and place of his proposed hearing of any testimony having in view the cancellation of the enrollment of your petitioner-, but, on August 22, 1906, took testimony against your petitioners without any opportunity for your petitioners to contest the same or to be represented by an attorney. That the record in the matter of the cancellation of your petitioners' enrollment shows that the said Lieber had the following notation made upon the testimony taken:

"The office of J. B. Campbell and the office of W. D. Halfhill were communicated with, and the said attorneys could not be found. J. G. Lieber called at the office of W. D. Halfhill and was notified that he was sick."

Your petitioners state that J. B. Campbell aforesaid never was the attorney for your petitioners. Your petitioners further state that the said W. D. Halfhill was sick in his bed at the time of the taking of the testimony, but sent a request that the hearing be postponed on account of his sickness, and the said request was by the said Lieber, acting as attorney for the Creek Nation, refused, and was refused likewise by the Commission to the Five Civilized Tribes, so that your petitioners had no opportunity to be represented by coun-

sel, nor were they represented in person. Your petitioners
10 state that there was no cross examination of the witness adduced on behalf of the Creek Nation in the attempt to cancel the enrollment of your petitioners. That your petitioners, through their attorney W. D. Halfhill, requested that the witnesses should be recalled for an opportunity for cross examination, but the same never was afforded them, although your petitioners are advised that their attorneys understood that the opportunity would be afforded him before the case was closed. Your petitioners further allege that the case was closed without an opportunity for them to cross examine the witnesses produced by the Creek Nation, and without an opportunity to introduce evidence on their own behalf. Your petitioners allege that all of the aforesaid proceedings were arbitrarily and illegally taken, and deprived your petitioners of vested rights in the lands and funds of the Creek Nation without due process of law.

Your petitioners allege that after they learned what had been done they filed affidavits denying the truth of the allegations made against them, and asked an opportunity to have the case reopened, but the same was denied them. Your petitioners allege that thereafter the Secretary of the Interior arbitrarily and illegally undertook to deprive your petitioners of the rights by law vested in them, and issued an order directing that the names of your petitioners should be canceled, and the final approved freedmen rolls, of the Creek Nation and the aforesaid final approved rolls of freedmen citizens of the Creek Nation show that the names of your petitioners were stricken or attempted to be stricken from the aforesaid final approved rolls by the mutilation of said rolls as follows:

A line drawn through the name of each of your petitioners, and the writing after the same of the following:

"Canceled February 14, 1907. See 15,945-07."

Your petitioners aver on information and belief that the changes noted above were not noted on all of the freedmen rolls of the Creek Nation made in accordance with law prior to March 4, 1907, but that some of the rolls, as your petitioners believe, and therefore aver, have been changed and mutilated in accordance with the mutilation hereinabove set forth subsequent to March 4, 1907.

Your petitioners aver that the cancellation, or attempted cancellation of the enrollment of your petitioners is arbitrary, illegal, and a denial to your petitioners of due process of law as guaranteed to them by the Constitution and Laws of the United States.

9. Your petitioners further state that they have made demand on the respondent as Secretary of the Interior that he cause the lines run through your petitioners' names to be erased, and the notations placed opposite their names to be erased, and to restore your petitioners to the rolls of citizens of the Creek Nation, and to recognize your petitioners as fully and completely as freedmen citizens of the Creek Nation as he held they were entitled to recognition prior to the hereinbefore mentioned illegal and arbitrary act of respondent's predecessor in office striking, or attempting to strike peti-

tioners' names therefrom, and that this Honorable Court order
11 and direct the Honorable Secretary of the Interior to permit your petitioners to select a lawful allotment of land in the Creek Nation, and to share in the Creek tribal funds, the said Secretary of the Interior having refused heretofore to permit your petitioners to do other than make a tentative notation of the lands they desired to select in the event that it should be adjudged by the courts that the cancellation of your petitioners' enrollments was illegal, right of occupancy and all other rights as of the date of their attempted selection of lands being denied them.

Wherefore, inasmuch as the Honorable James Rudolph Garfield, Secretary of the Interior, has refused to restore your petitioners to the approved rolls of freedmen members or citizens of the Creek Nation, to remove the cloud placed by his predecessor in office on your petitioners' rights, claims and demands as enrolled freedmen citizens or members of the Creek Nation, to recognize your petitioners as lawfully enrolled freedmen citizens or members of said Nation, and to make valid selections of allotments, and to share in the tribal funds of the Creek Nation, and as the law provides no other adequate remedy in the premises whereby your petitioners can be protected in their lawful rights, whereof they are now unjustly and arbitrarily deprived by the Secretary of the Interior, the defendant hereto, your petitioners pray:

1. That a writ of mandamus may be issued and directed to the Honorable James Rudolph Garfield, Secretary of the Interior, commanding him to erase or cause to be erased the marks or notations made on the approved rolls of the freedmen members of the Creek Nation in derogation of your petitioners' rights or claims as duly and lawfully enrolled freedmen citizens or members of said Nation, to restore your petitioners to full and lawful enrollment as freedmen citizens or members in said Creek Nation, and to recognize your petitioners as lawful freedmen citizens or members of said Creek Nation, with all the rights and privileges thereunto appertaining.

2. For such other and further right or rights or relief as to the Court may seem proper and the nature of the cases of your petitioners may require, and as in duty bound your petitioners will ever pray.

LUCY ANN TURNER,
DIXEY GRISWELL, AND
MAUDE TURNER,
WILLIE TURNER,
ANNA TURNER,
FLORENCE TURNER,
By Their Next Friend, LUCY ANN TURNER,
Petitioners.

KAPPLER & MERILLAT,
JAMES K. JONES,
Att'ys for Petitioners.

Before the subscriber, a Notary Public in and for Western District of the Indian Territory, on the 22 day of October A. D. 1907, per-

sonally appeared Lucy Ann Turner, who made oath on the
12 Holy Evangels of Almighty God that she had read the petition by her subscribed, and that the facts by her set forth in said petition are true to the best of her knowledge, information and belief.

LUCY ANN TURNER.

Subscribed and sworn to before me this 22 day of —— A. D. 1907.

[SEAL.] W. N. BROOK,
Notary Public, D. C.

My commission expires Oct. 5, 1908.

PETITIONERS' EXHIBIT A-1.

En. 531.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

In the Matter of the Application for the Enrollment of LUCY ANN TURNER, MAUD TURNER, ANNA TURNER, WILLIE TURNER, FLORENCE TURNER, and DIXEY GRISWELL as Creek Freedmen.

Decision.

The record in this case shows that on July 8, 1904, Lucy Ann Turner appeared before the Commission to the Five Civilized Tribes at Muskogee, Indian Territory, and made application for the enrollment of herself and her five minor children, Maude Turner, Anna Turner, Willie Turner, and Florence Turner, and Dixie Griswell, as Creek freedmen.

The record further shows that on April 26, 1904, William L. Turner appeared before said Commission and made application for the enrollment of himself and his four minor children Anna Turner, Willie, Florence and Maud Turner as Creek freedmen, said Anna, Willie, Florence and Maud Turner are identified as the Anna, Willie, Florence, and Maud Turner for whom application was made on July 8, 1904, by said Lucy Ann Turner. The Application of William L. Turner will be considered in a separate decision.

Further proceedings were had June 16, 1905.

A copy of the testimony in the case of William L. Turner et al. is made a part of the record herein.

The evidence shows that said Lucy Ann Turner is the daughter of Mary Ann Grayson, whose name appears on the roll of Creek freedmen made by J. W. Dunn prior to March 14, 1867, and that she was born since said roll was made.

The evidence further shows that said Maud Turner, Anna Turner, Willie Turner, Florence Turner, and Dixey Griswell are the minor children of said Lucy Ann Turner. That all the applicants herein were born prior to April 1, 1899, and that they are now residents of

the Creek Nation, they having recently removed to said Nation from the State of Tennessee, where they formerly resided. It is,
13 therefore, ordered and adjudged that said Lucy Ann Turner, Maud Turner Anna Turner, Willie Turner, Florence Turner, and Dixey Griswell are entitled to be enrolled as Creek freedmen in accordance with the provisions of the Acts of Congress of June 28, 1890 (30 Stats. 495) and March 1, 1901 (31 Stats. 861) and the application for their enrollment as such is accordingly granted.

TAMS BIXBY,
Commissioner.

Muskogee, Ind. Ter., Jan. 12, 1906.

PETITIONERS' EXHIBIT A-2.

Cr. En. 531.

MUSKOGEE, I. T., *Jan.* 13, 1906.

M. L. Mott, Attorney for the Creek Nation, Muskogee, Ind. T.

SIR: There is herewith enclosed one copy of the decision of the Commissioner to the Five Civilized Tribes in the matter of the application for the enrollment of Lucy Ann Turner, Maud Turner, Anna Turner, Willie Turner, Florence Turner, and Dixey Griswell, as Creek freedmen.

You are hereby advised that the Creek Nation will be allowed 15 days from date hereof within which to protest against the enrollment of said persons, and if at the expiration of said time no protest has been filed, the above-named persons will be regularly listed for enrollment as Creek freedmen.

Respectfully,

TAMS BIXBY,
Commissioner.

PETITIONERS' EXHIBIT A-3.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

In the Matter of the Enrollment of LUCY ANN, ANNA, WILLIE, and FLORENCE TURNER and DIXEY GRISWELL as Freedmen Citizens of the Creek Nation.

Motion to Reopen.

Comes now M. L. Mott, attorney for the Creek Nation and moves the Honorable Secretary of the Interior to reopen and to grant a rehearing in the matter of the enrollment of Lucy Ann, Anna, Willie and Florence Turner, and Dixey Griswell, who have been enrolled as freedmen citizens of the Creek Nation, for the reason that your petitioner has just this *to*-day learned that these persons procured their enrollment through fraud.

Your petitioner was to-day informed by Mr. E. L. Merrick, who was the original attorney for said applicants, that while acting as

their attorney said Merrick discovered that they were not entitled to enrollment, and that they were perpetrating a fraud upon the
14 Commission to the Five Civilized Tribes, and said Merrick withdrew from said case, and so notified the Commissioner to the Five Civilized Tribes.

Your petitioner further states that owing to the limited time in which he has to make this application, he is not able to file affidavits in support of this motion, but he is confident that if a rehearing is granted he will be able to show that said persons are not entitled to enrollment.

Your petitioner further states that said Merrick informed said applicants when he withdrew from their case that they were not entitled to enrollment, and he is informed that they have abandoned the case and returned to Texas.

M. L. MOTT.

Subscribed and sworn to before me this 25th day of June, 1906.

J. P. FARNSWORTH,
Notary Public.

Rule to Show Cause.

Filed October 29, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49891.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER et al., Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Mandamus.

On consideration of the petition filed herein, it is by the Court this 29 day of October, 1907, ordered that the Respondent, James Rudolph Garfield, Secretary of the Interior, show cause on or before the 15 day of November, 1907, why the writ of mandamus should not be issued as prayed.

WRIGHT, *Justice.*

Marshal's Return.

Served copy of the within rule to show cause, together with copy of the petition in this cause, on James Rudolph Garfield, Secretary of the Interior, personally.

Oct. 29, 1907.

AULICK PALMER, *Marshal.*
S.

15 *Answer.*

Filed January 2, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 49891.

THE UNITED STATES ex Rel. LUCY ANN TURNER, DIXEY GRISWELL, and Maude, Willie, Anna, and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Petitioner,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The respondent, for answer to the rule to show why the writ of mandamus should not issue as prayed in the petition filed herein, says:

That this court has no jurisdiction, by mandamus or otherwise, of the matters referred to in said petition, because said matters relate to the allotment of the lands of the Creek Indian Nation, one of the Five Civilized Tribes of Indians in the Indian Territory, and by the legislation of Congress and the agreements made by the United States with said nation, exclusive jurisdiction of all such allotment matters including the making of rolls of members of said nation for allotment purposes, was originally conferred exclusively upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, and at the time of the occurrence of the matters complained of in said petition such exclusive jurisdiction had been devolved exclusively upon the Secretary of the Interior, and still resides in him so far as it is necessary to complete such allotment work.

Further answering, respondent says that he denies that the relators, or any of them, are freedmen citizens or members of the Creek Nation in the Indian Territory or Creek freedmen by blood, or that they are legally enrolled as such upon the rolls of members of the Creek Nation prepared in pursuance of the legislation relating to the allotment of lands in the Five Civilized Tribes in the Indian Territory, or possessed of any vested interest in the lands or other property of the said Creek Nation.

Respondent further says that the records of the Interior Department show that the relator Lucy Ann Turner appeared before the Commission to the Five Civilized Tribes on July 8, 1904, and made application for the enrollment as Creek freedmen of herself and her five minor children, Maude, Anna, Willie, and Florence Turner and Dixey Griswell; that upon the hearing before said Commission upon said application, said Lucy Ann Turner represented, by herself and her witnesses, that she was the daughter of Mary Ann Grayson, whose name appeared on the roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March

14, 1867, which roll was confirmed by the Act of Congress
16 of June 28, 1898, section 21 (30 Stat., 495); that on January 12, 1906, upon the representations so made, the Commissioner to the Five Civilized Tribes, acting as the agent of the Secretary of the Interior, upon whom the duty of completing the unfinished business of the Commission was devolved by the Act of Congress of March 3, 1905 (33 Stat., 1060), decided that said Lucy Ann Turner and her said children were entitled to be enrolled as Creek freedmen; that on January 13, 1906, the Attorney for the Creek Nation was notified by the Commission of said decision and given fifteen days in which to protest against the enrollment of said persons; that no such protest was filed and the names of said persons were listed upon a partial schedule of Creek freedmen, which schedule was approved by Jesse E. Wilson, Assistant Secretary of the Interior, on June 16, 1906, and forms a part of the final rolls of the Creek Nation upon which allotments are made; that on June 25, 1906, M. L. Mott, the attorney for the Creek Nation, filed in the office of the Commissioner to the Five Civilized Tribes a motion, addressed to the Secretary of the Interior, to reopen and grant a rehearing in the matter of the enrollment of said Lucy Ann Turner and her said children, upon the ground that said persons had procured their enrollment through fraud, which fact had just come to his knowledge through information received from Mr. E. L. Merrick, the original attorney for said persons, and on August 8, 1906, the affidavit of said Merrick as to such fraud was filed in the office of said Commissioner in support of said motion to reopen, copy of which motion and affidavit, marked Exhibits A and B, are attached hereto and prayed to be taken as a part hereof; that on August 13, 1906, said Commissioner reported these facts to the Secretary of the Interior with a recommendation that said motion to reopen be granted, a copy of which report, marked Exhibit C, is attached hereto and prayed to be taken as a part hereof; that on September 17, 1906, said Commissioner made another report to the Secretary of the Interior, in which, after referring to his report of August 13, 1906, upon said motion to reopen, he said:

"In view of the statements set out in said motion as to a previous attempt to influence Mitchell Grayson to testify so that Lucy Ann Turner and her children might be enrolled, it was deemed advisable to procure the immediate attendance of Mitchell Grayson and Dolly Stidham before this office, in order that no opportunity might be afforded for a further attempt to influence the testimony of these witnesses.

On August 22, 1906, said Mitchell Grayson and Dolly Stidham appeared before this office and testified in the matter of the right to enrollment of Lucy Ann Turner, et al. The Creek Nation was represented by attorney at this hearing but though an endeavor was made to secure the attendance of said W. D. Halfhill and J. B. Campbell, applicant was not represented at said hearing.

In view of the testimony of Mitchell Grayson and Dolly Stidham I am of the opinion that a further hearing in this case is unnecessary; that Lucy Ann Turner and her children Maude Turner, Anna

Turner, Willie Turner, Florence Turner and Dixey Griswell,
17 were fraudulently enrolled as Creek Freedmen, and respectfully recommend that authority be granted for the striking of their names from the approved roll of Creek Freedmen.

It is further respectfully recommended that this matter be referred to the District Attorney for the Western District of Indian Territory for such investigation and other action as the premises may warrant.

Copy of transcript of testimony taken in proceedings had August 22, 1906, is inclosed herewith."

(A copy of said report, marked Exhibit D, is annexed hereto and prayed to be taken as a part hereof. A copy of the testimony taken in the proceedings before the Commissioner on August 22, 1906, marked Exhibit E, is also attached hereto and prayed to be taken as a part hereof.)

That by letter of November 7, 1906, C. F. Larrabee, Acting Commissioner of Indian Affairs, transmitted to the Secretary of the Interior the report of the Commissioner to the Five Civilized Tribes of August 13, 1906, transmitting the motion to reopen said case of Lucy Ann Turner et al., and also the Commissioner's report of September 17, 1906, upon said case; that in said letter said Acting Commissioner of Indian Affairs stated that "on September 15, 1906, William W. Wright, of this city, filed in this office affidavits of Lucy Ann Turner and William M. Turner, in support of her application, and entered her appearance in this matter," which affidavits controverted the allegations of fraud made in said affidavit of E. L. Merrick; that said Acting Commissioner of Indian Affairs then stated the history of the case of Lucy Ann Turner and her children, and reviewed the testimony taken at said hearing of August 22, 1906, before the Commissioner to the Five Civilized Tribes, and said that such testimony "is conclusive in the opinion of the office that Lucy Ann Turner procured the enrollment of herself and her children by false impersonation and practiced a fraud on the Commissioner; and it therefore concurs in the recommendation of the Commissioner that authority be granted for the striking of their names from the approved roll of Creek freedmen, and that the matter be referred to the District Attorney for the Western District of the Indian Territory for an ivestigation." (A copy of said letter of the Acting Commissioner of Indian Affairs of November 7, 1906, marked Exhibit F, is attached hereto and prayed to be taken as a part hereof.)

That on February 14, 1907, the Secretary of the Interior, by Hon. Thos. Ryan, First Assistant Secretary of the Interior, acting upon said report of the Acting Commissioner of Indian Affairs contained in said letter of November 7, 1906, authorized and directed the cancellation of the names of Lucy Ann Turner and her said children from the said partial schedule of Creek freedmen approved as aforesaid June 16, 1906. (A copy of the Department's letters of February 14, 1907, to the Commissioner of Indian Affairs and the Commissioner to the Five Civilized Tribes, to that effect, and of the

copies of said schedule in the possession of the Secretary and
18 the Commissioner of Indian Affairs showing that such cancellation was made, marked, respectively, Exhibits G, H, I and J, are attached hereto and prayed to be taken as a part hereof.)

Your respondent further says that, as he is informed and believes, the names of said persons were actually stricken from all the copies of said partial schedule prior to March 4, 1907, the time fixed by the Act of April 26, 1906 (34 Stat., 137), for the completion of said rolls.

Your respondent further says that at the time the names of said Lucy Ann Turner and her said children were stricken from said approved schedule neither she nor her children, nor anyone by or for them, had made any selection of land as an allotment, nor had they or either of them been given any allotment or received any allotment certificate, nor have they since that time obtained an allotment, or been given an allotment certificate.

Your respondent further says that the action of his predecessor in striking the names of Lucy Ann Turner and her said children from said approved partial schedule of members of the Creek Nation was in accordance with his long established and well recognized practice with respect to the rolls of the Five Civilized Tribes, as appears from an inspection of said rolls, he having exercised the right to strike names from such approved partial lists or schedules of members of said tribes down to the close of March 4, 1907, the date fixed by the Act of Congress of April 26, 1906 (34 Stat., 137), for the completion of such rolls, whenever, in his judgment, such names were improperly or erroneously placed thereon, and having, during that time, stricken several hundred names from said approved partial lists or schedules for said reasons, with and without notice as the exigencies of each case seemed to demand. Respondent further says that there was no law, rule or regulation requiring the giving of notice and opportunity to be heard in such cases.

And your respondent further says that, as he is informed and believes, the enrollment of said Lucy Ann Turner and her said children was procured by fraud, and such relators are not freedmen members, or members by blood, or intermarriage, of the Creek Nation, and are not legally or equitably entitled to participate in the allotment and distribution of the lands and other property of the Creek Nation.

Wherefore respondent prays that the rule to show cause be discharged and the petition dismissed.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

EDWARD T. SANFORD,
Assistant Attorney General.
WILLIAM R. HARR,
Special Assistant to the Attorney General.

19 DISTRICT OF COLUMBIA, *ss:*

James Rudolph Garfield, being first duly sworn, deposes and says: That he is the person referred to as respondent in the above an-

swer; that he has read the contents thereof, and that the facts therein stated of his own knowledge are true, and those stated on information and belief he believes to be true.

JAMES RUDOLPH GARFIELD.

Subscribed and sworn to before me this — day of December, 1907.

[SEAL.] EDW'D B. FOX,
Notary Public, D. C.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

In the Matter of the Enrollment of LUCY ANN, ANNA, WILLIE, and FLORENCE TURNER, and DIXIE GRISWELL as Freedmen Citizens of the Creek Nation.

Motion to Reopen.

Comes now M. L. Mott, Attorney for the Creek Nation, and moves the Honorable Secretary of the Interior to reopen and to grant a rehearing in the matter of the enrollment of Lucy Ann, Anna, Willie and Florence Turner, and Dixie Griswell, who have been enrolled as Freedmen citizens of the Creek Nation, for the reason, that your petitioner has just this *to*day learned that — persons procured their enrollment through fraud.

Your petitioner was to-day informed by Mr. E. L. Merrick, who was the original attorney for said applicants, that while acting as their attorney said Merrick discovered that they were not entitled to enrollment, and that they were perpetrating a fraud upon the Commission to the Five Civilized Tribes, and said Merrick withdrew from said case, and so notified the Commissioner to the Five Civilized Tribes.

Your petitioner further states that owing to the limited time in which he has to make this application, he is not able to file affidavits in support of this motion, but he is confident that if a rehearing is granted, he will be able to show that said persons are not entitled to enrollment.

Your petitioner further states that said Merrick informed said applicants when he withdrew from their case, that they were not entitled to enrollment, and he is informed that they have abandoned the case and returned to Texas.

M. L. MOTT.

Subscribed and sworn to before me, this 25th day of June, 1906.

[SEAL.] JAY P. FARNSWORTH,
Notary Public.

20 EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, INDIAN TERRITORY.

In the Matter of the Enrollment of LUCY ANN, ANNA, WILLIE, and FLORENCE TURNER, and DIXIE GRISWELL as Freedmen Citizens of the Creek Nation.

Motion to Reopen.

Edward Merrick, on oath states that he is forty five years of age, a resident of Muskogee, Indian Territory, and at present is in the employ of the Commissioner to the Five Civilized Tribes in the capacity of law clerk; that in the summer of 1904 he was associated with John G. Lieber, an attorney at law, in the general practice of law; that he and said John G. Lieber were duly admitted to practice before the Commission to the Five Civilized Tribes; that some time during the summer of 1904, one William M. Turner, husband of Lucy Ann Turner, the principal applicant herein, employed said Lieber and affiant to look after the matter of the enrollment of the applicants herein and that affiant did on July 8, 1904, appear before the Commission with said Lucy Ann Turner and two or three witnesses produced by her, and at that time certain testimony was offered on behalf of the applicants.

Affiant further states that after the hearing had on July 8, 1904, a consultation was held in the office of said Lieber and affiant at which consultation said Lucy Ann Turner and her husband, William M. Turner, were present; that at this time the Turners were advised that in view of the fact that said Lucy Ann Turner was born prior to the making of the Dunn roll and her name not appearing thereon her chances for enrollment were very slight, even if she could establish the fact that she was the daughter of one Mary Ann Grayson whose name does appear on said Dunn roll; that said Lucy Ann Turner then said that she probably was not that old; that she had a brother Mitchell Grayson and a sister Dolly Stidham who would know and that she would have them consult us.

Affiant further states that afterwards said Mitchell Grayson did appear at the office of said Lieber and affiant and said positively that he had no such sister as Lucy Ann Turner and that he never heard of her before. Said Mitchell Grayson was so positive in his statements that some doubt arose in the mind of affiant whether the said Lucy Ann Turner was the person she represented herself to be. Mitchell Grayson further stated that he lived with his mother for many years and he knew she never had a child that would answer for said Lucy Ann Turner.

Affiant further states that two or three days after said Mitchell Grayson's visit to the office of said Lieber and affiant he
21 (Mitchell Grayson) called again and said that probably he was mistaken about not having a sister about the age of

Lucy Ann Turner; that he could not say he did not have such a sister and that probably he did have one whom he never saw and who had been out of the Territory all her life. Affiant further states that after this interview with said Mitchell Grayson he (affiant) had a talk with William Turner, the husband of Lucy Ann Turner, at which time said Turner told affiant that said Mitchell Grayson would now testify all right as he had "fixed it up with him"; that Turner further stated that he could get all such testimony as might be required in order to have his wife and her children enrolled as Creek freedmen. Said Turner was informed by affiant that no "fixed" testimony would be allowed by the attorneys of applicant.

Affiant further states that he wrote to Dolly Stidham, the alleged sister of said Lucy Ann Turner, and received a reply in which she stated that she had no such sister as Lucy Ann Turner and that she knew her mother had no such child.

Affiant further states that upon receipt of this letter from Dolly Stidham denying relationship with principal applicant and in view of the statements made by Mitchell Grayson and the ability of said William M. Turner to produce any and all necessary evidence, he and Mr. Lieber concluded that the case was a fraudulent one and that further connection with the same was entirely out of the question and that they so informed William M. Turner who replied that the case had better be dropped; that affiant called at the office of the Commission and informed the clerk in charge of the Creek enrollment division that his (affiant's) and Mr. Lieber's connection with the Turner case had ceased and asked that the application for the enrollment of these people be withdrawn for the reason that *we* believed it to be fraudulent and without any merit whatever.

Affiant further states that he believed that this application had been withdrawn and knew no better until very recently.

EDWARD MERRICK.

Subscribed and sworn to before me this 8 day of August 1906.

[SEAL.] HENRY G. HAINS,
Notary Public.

EXHIBIT "C."

Cr. En. 531.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, INDIAN TERRITORY, *August* 13, 1906.

The Honorable The Secretary of the Interior.

SIR: On January 12, 1906, decision was rendered by the Commissioner to the Five Civilized Tribes granting the application for the enrollment of Lucy Ann Turner and her five minor children, Maude Turner, Anna Turner, Willie Turner, Florence Turner and Dixey Griswell, as Creek freedmen.

22 The records of this office show that the names of said applicants are listed upon a partial schedule of Creek freedmen approved by the Secretary of the Interior June 16, 1906, opposite

roll numbers 5650, 5651, 5652, 5653, 5654 and 5655, respectively. It does not appear from said records that allotment selections of land in the Creek Nation have been made by or for any said applicants.

There is inclosed herewith for Departmental consideration motion to reopen said cause filed with this office June 25, 1906. There is also inclosed an affidavit filed August 8, 1906, in support of said motion.

The statements set forth in said motion as grounds for rehearing are in substance as follows: that William M. Turner, husband of the principal applicant, retained the law firm of Merrick & Lieber to look after the matter of the enrollment of said applicants; that after the original hearing in said cause had on July 8, 1904, consultation was held in the office of said attorneys at which time said Lucy Ann Turner and her husband were present and were advised that in view of the fact that said Lucy Ann Turner was born prior to the making of the Dunn roll and her name not appearing thereon, her chances for enrollment were very slight even if she could establish the fact that she was the daughter of one whose name appears on said roll; that said Lucy Ann Turner then said that she probably was not that old, that she had a brother Mitchell Grayson and a sister Dolly Stidham who would know and she would have them consult said attorneys; that afterwards said Mitchell Grayson appeared at the office of said attorneys and said positively that he had no such sister as Lucy Ann Turner and that he never heard of her before, that he lived with his mother for many years and knew she never had a child that would answer for said Lucy Ann Turner; that at a later date said Mitchell Grayson stated to said attorneys that he was probably mistaken about not having a sister about the age of Lucy Ann Turner, that probably he did have one whom he never saw and who had been out of the territory all her life; the said affiant later had a talk with said William M. Turner, at which time Turner stated that Mitchell Grayson would now testify all right as he had "fixed it up with him"; that said affiant wrote Dolly Stidham, the alleged sister of said Lucy Ann Turner, and received a reply in which she said she had no such sister as Lucy Ann Turner and that she knew her mother had no such child; that said affiant and his law partner, Mr. Lieber, upon receipt of said letter from Dolly Stidham and in view of the statements of Mitchell Grayson and William M. Turner, concluded that the case was a fraudulent one, that they so informed William M. Turner who replied that he guessed it had better be dropped; that said affiant informed the clerk who was at that time in charge of the Creek enrollment division of the Commission that the connection of his firm with the Turner case had ceased and asked that the application be withdrawn for the reason that it was considered by said attorneys to be fraudulent and without merit.

There is no record on file to show that said attorneys informed this office that they had withdrawn from the case or that
23 they considered it fraudulent. The decision of the Commissioner enrolling said applicants was based upon the evidence.

Lucy Ann Turner testified on July 8, 1904, that she was born in

the year 1861 and in later proceedings had on June 16, 1905, said applicant testified that she was born in the year 1868.

I am of the opinion that the contradiction in the testimony as to the date of birth of the principal applicant, when considered in connection with the statements set out in said motion, are sufficient to warrant a presumption of fraud and I respectfully recommend that said motion to reopen be granted in order that the testimony of Mitchell Grayson and Dolly Stidham, the alleged brother and sister of the principal applicant, may be secured, also such other evidence as may be necessary to establish the facts in the case.

The entire record in the matter is inclosed herewith.

Respectfully,

TAMS BIXBY,
Commissioner.

Through the Commissioner of Indian Affairs.
A. G.-2.

EXHIBIT "D."

Cr. En. 531.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, INDIAN TERRITORY, *September* 17, 1906.

The Honorable the Secretary of the Interior.

SIR: August 13, 1906, there was transmitted for departmental consideration motion to reopen in the matter of the application for the enrollment of Lucy Ann Turner, et al., as Creek Freedman, together with report of the Commissioner in same. In said report it was stated that "the contradiction in the testimony as to the date of birth of the principal applicant, when considered in connection with the statements set out in said motion, is sufficient to warrant a presumption of fraud," and it was recommended that said motion be granted in order that the testimony of Mitchell Grayson and Dolly Stidham, the alleged brother and sister of the principal applicant, might be secured.

August 18, 1906, there was filed with this office a power of attorney signed by Lucy Ann Turner appointing W. D. Halfhill and J. B. Campbell as her attorneys in the matter of the enrollment of herself and children, and revoking the former power of attorney issued by her to E. C. Merritt (presumably referring to Edward Merrick).

In view of the statements set out in said motion as to a previous attempt to influence Mitchell Grayson to testify so that Lucy Ann Turner and her children might be enrolled, it was deemed advisable to procure the immediate attendance of Mitchell Grayson and Dolly Stidham before this office, in order that no opportunity might be afforded for a further attempt to influence the testimony of these witnesses.

24 On August 22, 1906, said Mitchell Grayson and Dolly Stidman appeared before this office and testified in the matter of the right to enrollment of Lucy Ann Turner, et al. The

Creek Nation was represented by attorney at this hearing but though an endeavor was made to secure the attendance of said W. D. Halfhill and J. B. Campbell, applicant was not represented at said hearing.

In view of the testimony of Mitchell Grayson and Dolly Stidham I am of the opinion that a further hearing in this case is unnecessary; that Lucy Ann Turner and her children Maude Turner, Anna Turner, Willie Turner, Florence Turner and Dixey Griswell, were fraudulently enrolled as Creek Freedmen, and respectfully recommend that authority be granted for the striking of their names from the approved roll of Creek Freedmen.

It is further respectfully recommended that this matter be referred to the District Attorney for the Western District of Indian Territory for such investigation and other action as the premises may warrant.

Copy of transcript of testimony taken in proceedings had August 22, 1906, is inclosed herewith.

Respectfully,

TAMS BIXBY,
Commissioner.

Through the Commissioner of Indian Affairs.
J. C. L.-8-1.

EXHIBIT "E."

Cr. En. 531.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, INDIAN TERRITORY, *August* 22, 1906.

In the Matter of the Right to Enrollment of LUCY ANN, MAUDE, ANNA, WILLIE, and FLORENCE TURNER, and DIXEY GRISWELL as Creek Freedmen.

Appearances: J. G. Lieber acting for M. L. Mott, attorney for Creek Nation.

The office of J. B. Campbell and the office of W. D. Halphill were communicated with and the said attorneys could not be found. J. G. Lieber called at the office of W. D. Halphill and was informed that he was sick.

MITCHELL GRAYSON being first duly sworn, testified as follows:

Questions by COMMISSIONER:

Q. What is your name?
A. Mitchell Grayson.
Q. How old are you Mitchell?
A. I am 53.
Q. What is your post-office address?
A. Summit.
Q. Are you a citizen of the Creek Nation?
A. Yes, sir, I am.
Q. You have received your allotment have you?

A. Yes, sir.
Q. You are a Creek freedman?
A. Yes, sir.
Q. What was the name of your mother?
A. Mary Ann Grayson.
25 Q. Is she living?
A. No sir, she is dead.
Q. When did she die?
A. It is about 9 years since she died.
Q. Was your father a citizen of the Creek Nation?
A. Yes, sir, my father died though during the war.
Q. How many children did your mother have?
A. My mother had Bob and Josh and Sam and Ben and Tom and me, five and three girls.
Q. What was the names of the girls?
A. The oldest one was named Tilda. The next was Dolly Stitum. The next was Fannie Hobler.
Q. Is that all the children your mother ever had?
A. Those are the onliest children mother ever had.
Q. Did you live with your mother or near her most of your life?
A. I lived right with her all the time until she got so she couldn't get around, and after I got married she lived with me. I am the youngest child.
Q. How many times was your mother married did you say?
A. Never was married but twice. She was married back in the old country they came from Alabama here, and after she came here she married my father.
Q. What children had she by her husband in Alabama?
A. Tilda and Sam.
Q. Did she bring them with her here?
A. Yes sir.
Q. Is that all the children she brought with her?
A. Those are the onliest two she had.
Q. Do you know the name of her first husband?
A. Hillibee Charles.
Q. When she came to this country she married another man?
A. Yes sir.
Q. What was the name of her second husband?
A. Jacob Bruner.
Q. Was he a citizen of the Creek Nation?
A. Yes sir.
Q. Did he ever separate from your mother?
A. Never did until he died. He died during the war.
Q. How long before your mother's death did he die?
A. He died in '61. If I am not mistaken he died over here near Gibson and mother stayed single and stayed with her child- until we were all grown.
Q. How old was she when she died?
A. Napoleon Moore said she was 103 years old when she died.
Q. Then she died about 9 years ago?
A. Yes sir.

Q. Are there any old people living in the same community in which your mother lived and who knew her most of her life and as to how many children she had?

A. Yes, I can get a whole lot of them, Indians and colored.

Q. Would you name one or two of those people?

A. There is old man Wash Grayson at Eufala, Captain Grayson and these two men in the room here.

Q. What are their names?

A. John Roberts and Dick Bruner.

26 Q. How many of these children are left of these 5 boys and 3 girls?

A. I am the onliest one, I and Dolly Stitum.

Q. Is Dolly here today?

A. I don't know whether she is or not.

Q. Did your mother ever live with any other men after the death of your father?

A. No sir, never did.

Q. You are sure she had no children except the ones you have named?

A. Yes sir, I am sure.

Q. When did your mother reach the territory?

A. I couldn't tell you that.

Q. Was it before or after the war?

A. Way before the war.

Q. Did your mother die before the opening of the Creek Land office?

A. Yes sir.

Q. How long before?

A. About a year.

Questions by JOHN G. LIEBER, acting for Creek Nation:

Q. Mitchell did your mother have any brothers or sisters?

A. Yes, she had a whole lot of brothers and sisters.

Q. Can you give their names?

A. Yes, I guess I can. There is old man Robbin Grayson, Ben Grayson, Joe Hutton, Doc Crabtree, Dick Grayson.

Q. Is that all?

A. That is all the brothers.

Q. Did your mother have any sisters?

A. Yes sir.

Q. Name them?

A. There was Pussy Barnett across the river. Bessie Burney, Jennie Alexander, that is all I know. Of course she had more but they died before they came to my recollection.

Q. Do you know a woman by the name of Lucy Ann Turner?

A. No sir. I seen the nigger once but I don't know her.

Q. Did you ever know of a woman in your family by the name of Lucy Ann?

A. No sir.

Questions by COMMISSIONER:

Q. Did any one by the name of Lucy Ann Turner ever write to you or ever come to you and talk with you?

A. She wrote to me and went to Dolly and Dolly gave her a cussing and she went off and we never have seen her.

Q. Dolly who?

A. Stitum.

Q. Have you that letter?

A. I threw it away.

Q. What did she say in that letter?

A. She said she was a sister of ours, I said I didn't know anything about it, she said she was 26 years old and I knew that was a lie because I have a boy 26 years old and my mother was an old woman when I came to my recollection. I don't know anything about that nigger woman.

Q. Do you think you would have known something about it if your mother had a daughter by the name of Lucy Ann?

A. It looks like I ought to, I was raised right with her and I know her and know I am the youngest one of the children.

Q. Did you answer that letter that you got from Lucy Ann Turner?

A. No sir.

Q. You never saw her to talk with her did you?

A. I saw her and talked with her and told her I didn't
27 know anything about her and that she was nothing but a state woman. I said mother only had three girls and I knew them all.

Q. What did she say to you when you had that talk with her?

A. She said she was a sister of mine and I said no, you make a mistake, it might have been somebody else, and she said no somebody told her that her mother's name was Mary Ann Grayson, and I know that mother never did have a child like you, I told her, I said who was your father? And she said I forget his name. And I said well my father took me in to Arkansas and I stayed there all the time, and I said to her, I don't know anything about you and Dolly is the oldest and if she says that you are mother's child it is all right with me and Dolly gave her a cussing and she would put her in jail if she came back there again and I never did see her since.

Q. Is your sister Dolly Stitum here today?

A. I don't know whether she was subpœnaed here but I guess she will be here sometime today.

Q. Do you remember of meeting the husband of Lucy Ann Turner, a man named William M. Turner?

A. He was at my house.

Q. Did you come to Muskogee with him?

A. Yes, I came with him.

Q. Did he take you up in a law office?

A. I went with him to some of these law offices and I told them lawyers I didn't know nothing about this woman, she was too young to be my mother's child, I said I was the youngest one of the bunch and she never was married after my father died and I can prove that.

Q. Where did you have that talk with Lucy A. Turner, here in Muskogee or did she come to your house?

A. No, she never was at my house.

Q. You saw here here in Musgkogee, did you?

A. I saw her here in Muskogee, but I didn't have any talk with her at that time. When I saw her, I said you are not my sister because I don't know anything about you and if mother had any other children younger than me I ought to know it. All the girls were older than I was.

Q. You stated a minute ago that you met Lucy Ann Turner here in Muskogee and didn't have a talk with her.

—. I met her in Muskogee and she came up to me and said I am your sister and I said no sir you are not my sister.

Q. Then you did have a talk with her?

A. Yes sir.

Q. Did you mean you did most of the talking?

A. Yes sir, first her husband came to my house, that nigger, and he stayed there a day or two to bring some cotton hands over and when we came back this woman was here and she spoke to me, and I said No, you are no sister of mine and you go to Dolly and if she claims you as a sister she knows.

Q. You would probably know as much about your sisters and your mother's children as Dolly would, wouldn't you?

A. It looks like I ought to. I know mother never did marry after father died.

28 PETER BRUNER, being first duly sworn, testified as follows:

Questions by J. G. LIEBER, acting for Creek Nation:

Q. What is your name?

A. Peter Bruner.

Q. How old are you?

A. About 75 years old this month.

Q. What is your post-office address?

A. Edna, Indian Territory.

Q. Do you know Mitchell Grayson who has just left the witness stand?

A. Yes sir.

Q. How long have you known him?

A. I have known him from a child on up.

Q. Ever since he was born?

A. Yes sir.

Q. Do you know his mother?

A. Yes sir.

Q. What was her name?

A. Mary Ann Grayson. They called her Mary Ann Bruner and changed around to Mary Ann Grayson. Called her Mary Ann Grayson and Mary Ann Bruner.

Q. Is she related to you?

A. She was my step-mother.

Q. Are you a citizen of the Creek Nation?

A. Yes sir.

Q. Were you well acquainted with the family of Mary Ann Grayson?

A. I think I do, I might forget some of them but I know the best of them anyhow.

Q. But did you live with them?

A. Yes, sir, we moved back on this side and went over the river. First we lived on this side of the Canadian river west of Eufaula and went on the other side of the river then and then came back and went back to where we are living now. She died up here at Okmulgee.

Q. How often did you see Mary Ann Grayson from the time she was a grown woman until she died?

A. She came from the country in 1827.

Q. From that time how often did you see Mary Ann Grayson?

A. Often times, she was my step-mother you know and I lived with them 5 or 6 months.

Q. Did you see her as often as once a year from that time until she died?

A. Oh yes.

Q. Give the names of her children as nearly as you can?

A. The first two children she had were (not?) my father's children. Tilda and Bull, we call him Bull that was his given name.

Q. What was the name of her other children?

A. They were my father's children as far as I can remember them. One they called Bob, Mitchell, Josh, and Dolly and Fannie. I may have left out some, I may have forgotten some.

Q. Do you know a person by the name of Lucy Ann Turner?

A. I might but I don't know her.

Q. Did you ever hear of a child in Mary Ann Grayson's family by the name of Lucy Ann?

A. Not until today when you asked that question.

Q. If she would have had a child by that name would you have known it?

A. I might have heard it at that time.

Q. Did you know Mary Ann Grayson until she died?

A. Yes sir.

29 JOHN ROBERTS being first duly sworn testified as follows:

Questions by JOHN G. LIEBER, acting for Creek Nation:

Q. What is your name?

A. John Roberts. Some call me John Cat. I have two names.

Q. How old are you John?

A. I am 63.

Q. What is your post-office address?

A. Taft.

Q. Are you a citizen of the Creek Nation?

A. Yes sir.

Q. Do you know Mitchell Grayson who testified as a witness in this case a few minutes ago?

A. Yes sir.

Q. How long have you know- him?

A. It has been a good while it must have been about 50 years I reckon, I knew him when he was a kid.
Q. Have you known him ever since he was born?
A. Yes sir.
Q. Did you know his mother?
A. Yes sir.
Q. What was her name?
A. Mary Ann Grayson.
Q. How long have you known Mary Ann Grayson?
A. Well I know her since I came to my senses, that was my uncle's wife.
Q. Did you know her from that time until she died?
A. Yes sir.
Q. Did you see her often?
A. Yes sir.
Q. Did you live in the same neighborhood with her?
A. No, she had moved up there to Okmulgee, but I used to go up there all the time.
Q. How often did you see her John?
A. Once a year sometimes twice or three times.
Q. During the year?
A. Yes sir.
Q. Are you well acquainted with the family?
A. Yes sir.
Q. Do you know her children?
A. Yes sir.
Q. Give their names?
A. Well there was Tilda and Bull, they was another man's children, and Bob and Dolly and Josh and Ben, one they called Fannie Palmer and Mitchell.
Q. Did you ever hear of Mary Ann Grayson having a child named Lucy Ann?
A. No sir not until this morning.
Q. If she had had a child by that name would you have known it?
A. I would have been bound to know it.
Q. What relation are you to Mitchell Grayson?
A. Mitchell's father and my father are two brothers. That would make us first cousins.
Q. Did Mary Ann Grayson ever have any children younger than Mitchell?
A. No sir, Mitchell was the baby child.

DOLLY STITUM being first duly sworn, testified as follows:

Questions by JOHN G. LIEBER, acting for Creek Nation:

Q. What is your name?
A. Dolly Stitum.
Q. How old are you Aunt Dolly?
A. I guess I is about 65.
Q. What is your post-office address?
A. Okmulgee.

Q. Are you a citizen of the Creek Nation?
A. Yes sir.
Q. Do you know Mitchell Grayson who is sitting by you?
A. Yes sir, I know him, I raised him, he is my brother.
Q. Did you and William Grayson have the same mother?
A. Yes one father and one mother.
Q. What was your mother's name?
A. Mary Ann Grayson, my father's name was Jacob Bruner, but we used to go by our own names.
Q. Did your mother have any children older than you Aunt Dolly?
A. Yes sir.
Q. Did your mother have any other children besides you?
A. Yes, sir, her first child was Tilda Grayson.
Q. The next one?
A. He was named Sam Grayson.
Q. Did he have any other name besides Sam?
A. We nick-named him kind a funny, we called him Bull.
Q. What was her next child then?
A. Bob was the next. Bob Grayson but he is dead he got killed during the war.
Q. Do you know all of your mother's children? Give their names besides those you have just named?
A. I will go way back—there was Tilda first and Sam we called him Bull he was second. Bob Grayson, Dolly Stitum, used to have been Dolly Grayson. Joshua Grayson, Ben Grayson, we used to call him, nick name Kiver, it might be down that way I don't know.
Q. Next one?
A. Fannie Grayson.
Q. Next one?
A. Manuel Grayson.
Q. Next one?
A. Mitchell Grayson.
Q. Are there any others Dolly?
A. No sir, if I am not mistaken I think she had only 9 children, if I am not making a mistake.
Q. Was there one by the name of Palmer?
A. That was Manuel. That was his nick name, Palmer.
Q. Was Mitchell Grayson your mother's youngest child?
A. Yes he was the baby.
Q. Did she ever have any children after him?
A. No sir never had any children after him.
Q. Do you know a woman by the name of Lucy Ann Turner?
A. No sir.
Q. If she would have had a child by that name would you have known it?
A. Yes sir, I would have been bound to know it.
Q. Did you know your mother at the beginning of the Civil War?
A. Yes sir, I lived right by her in the same adjoining yard.
Q. Did you continue to live near to her from that time until she died, Aunt Dolly?

A. Yes sir. Of course I parted from mother two years we went down South, we went as far as Baldy in the Choctaw Nation and mother she went to Ft. Gibson, never went any further.

Q. With the exception of that two years that she was away from you during the war, was she ever away from you any considerable time after that?

A. No sir, I lived right by my mother and I buried her.

Q. Did you live right by your mother from the time peace was declared until she died?

A. Yes sir, and I buried my mother.

Q. Never heard of her having a child named Lucy Ann?

A. No sir, my mother said we was all the children she ever had.

31 Questions by COMMISSIONER:

Q. Did you have a conversation with anyone by the name of Lucy Ann Turner?

A. Yes sir.

Q. Did she come to your house to talk with you?

A. Yes she came at the time she wrote me a letter first, though.

Q. Have you that letter?

A. No sir, I haven't got it.

Q. What was said in that letter?

A. She just wanted to claim my mother was her mother.

Q. Did you answer the letter?

A. No sir, I didn't because I knew mother didn't have any children like that.

Q. After she wrote that letter did she call on you in person?

A. Yes sir.

Q. What did she say to you?

A. When she first came up I was at the church, at the Indian church, and they hired my daughter to go and call me, so we came up, that was on Sunday and came to my daughter's house in Okmulgee, and I saw her there.

Q. What did she say to you?

A. Her husband came up and said that was my sister; that was while I was in the wagon before I got down and I told him if I had any sister outside of me, I didn't know it. I knew where all of my sisters was buried and if I got any other I ought to know it.

Q. Did you tell Lucy Ann Turner that?

A. Yes sir. She said it looks like I am your sister because my mother was your mother.

Q. That is what she said?

A. Yes sir, and I said to her my mother didn't have only the three girls and I named them. Her first child was named Tilda I told her, and the next one was named Sam and the second was named Bob, and I told her then it was me, and one named Josh and a sister named Fannie, I told them she was dead, and I have a brother named Mitchell and a half brother named Dick Bruner. Then she said like this to me, ain't you got no older brothers than you and I

said yes, and -he said suppose I claim one of them to be my father and I said that is your business but I will not do it.

Q. Did she use that expression, "suppose I claim one of those brothers to be my father"?

A. Yes and she paid me $2.00 to come down here and I didn't come because I didn't *sup*pose to come before the Dawes Commission and swear any lie, I *I* am going to tell the truth and if it will do good it will do good and if it is going to hurt it will hurt, and I told them I would come and I didn't do it. And he sent a man out there, he got into a scrap about taking somebody's mule and got some money on it, and she sent that man to get me to come down and said if I could fix it up to come and say she was my brother's child she would give me a $100. And I said I have got $2500 cash money in my pocket and in my hand, that I wasn't poor and I turned the money back.

Q. Was it a colored man that came for you?

A. Yes sir. I said I will state what I know to the Dawes Commission and he said if I take you in today you will ruin us, and now you know the truth.

Q. Have you seen the man since he offered you the money?

A. No sir.

32 Q. Do you know whether he lived in Muskogee?

A. No sir he lived in Okmulgee. Her husband was in Jail but he sent this man out to see if he could get me.

Q. Have you seen her since?

A. No sir, I never seen her since.

Q. Have you heard from her since then?

A. No sir, it has been two years ago because I know it has been two years since I seen her. The first time he wrote he was at my brother's house and they called me to the office in Okmulgee and I was just going out, he sent a boy up to tell me to come that they had news for me, but anyway I was in town and they overtook me as I was going home and I turned back. I can't hear very good, so I told him to go to the phone and see who it was and they said it was my brother and he told me to be up at Choske and he would be there to meet me and take me to his house and I didn't do it. I got in the wagon and went to the Indian meeting.

MITCHELL GRAYSON, being recalled testified as follows:

Questions by COMMISSIONER:

Q. You told of a conversation you had with Lucy Ann Turner, did she offer you any money to testify?

A. Yes she said she would give part of her land if she gets it. I said you go to Dolly and if she claims to be your sister it is all right with me, and I said too many state niggers come in here now, that is how we got cut off so short with our land and I won't swear no lie for you.

This is all the evidence taken in said cause at said time.

I, Julia C. Laval on my oath state that the above and foregoing is a true and complete transcript of my stenographic notes as taken by me on said date in said cause.

JULIA C. LAVAL.

Subscribed and sworn to before me this 7 day of September, 1906.
[SEAL.] EDWARD MERRICK,
Notary Public.

EXHIBIT "F."

DEPARTMENT OF THE INTERIOR, E. B. H.,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *November* 7, 1906.

Refer in reply to the following:
Land
70862-1906
80421- "
83247- "

The Honorable The Secretary of the Interior.

SIR: I have the honor to submit herewith a communication from the Commissioner to the Five Civilized Tribes, dated August
33 13, 1906, transmitting a motion to re-open the Creek enrollment case of Lucy Ann Turner, et al.; also a communication dated September 17, 1906, reporting on the same case.

On September 15, 1906, William W. Wright, of this city, filed in this office affidavits of Lucy Ann Turner and William M. Turner, in support of her application, and entered his appearance in this matter. Lucy Ann Turner appeared before the Commission to the Five Civilized Tribes on July 8, 1904, and made application for the enrollment of herself and her five minor children as Creek freemen. The evidence produced at that time went to show that Lucy Ann Turner was the daughter of one Mary Ann Grayson, whose name appeared on the roll of Creek freedmen made by J. W. Dunn prior to March 14, 1867, and that the applicant was born since the roll was made, and on January 12, 1906, Mary Ann Turner was enrolled as a Creek freedman in accordance with the provisions of the act of Congress of June 28, 1898. (30 Stat. 495.)

On June 25, 1906, the attorney for the Creek Nation filed a motion to re-open and re-hear the case, setting out that his motion was based on the alleged fact that the enrollment of these persons was procured through fraud, inasmuch as he had learned through their original attorney that while acting for them he had discovered that they were not entitled to enrollment and were perpetrating a fraud on the Commission to the Five Civilized Tribes, and that he thereupon withdrew from the case and notified the Commission to the Five Civilized Tribes of that fact.

The Commissioner took testimony in this matter on August 22, 1906. Mitchell Grayson, aged 53, and a Creek freedman, whose

mother was Mary Ann Grayson, testified that his mother died about nine years ago; that she was the mother of five boys and three girls the boys being named Bob, Josh, Sam, Ben, Tom and the witness Mitchell, and that the girls were named Tilda, Dolly and Fannie; that he lived with his mother all his life until he was married, and then she moved in and lived with him, and that he was the youngest child; that he knew of no person by the name of Lucy Ann Turner, and was positive that she is not his sister or related to him in any way; that Lucy Ann Turner wrote a letter to him at one time and went to his sister, Dolly Stidham, claiming to be her sister, but that Dolly Stidham denied the fact.

The testimony of Peter Brewer, 75 years old, and residing at Edna, was that he had known Mitchell Grayson from a child up; knew his mother, Mary Ann Grayson, and that she was his stepmother; that he knew all of her children and that he never heard of any child in Mary Ann Grayson's family by the name of Lucy Ann, and never heard of her until the day he gave his testimony.

John Roberts, aged 63, testified that he had known Mitchell Grayson for about 50 years; also that he knew Mary Ann Grayson during her life time; knew that Mitchell Grayson was her youngest child; was able to name all of her children in their order, and had never heard of the child by the name of Lucy Ann until the morning he gave his testimony, and said that he would be bound to know of such child, had there ever been one.

34 The testimony of Dolly Stidham was to the effect that Mary Ann Grayson was her mother; was able to name the children in their order, saying that Mitchell Grayson was her mother's youngest child and that she had no child by the name of Lucy Ann. She detailed at some length the efforts made by Lucy Ann Turner to induce her to accept her as a sister and then asked witness if she had brothers older than she and proposed then that she claim one of the older brothers as her father, and proposed that if she was successful in this, that she would pay the witness $100.

The testimony submitted in the Commissioner's letter of September 17, 1906, is conclusive in the opinion of the office that Lucy Ann Turner procured the enrollment of herself and her children by false impersonation and practiced a fraud on the Commissioner; and it therefore concurs in the recommendation of the Commissioner that authority be granted for the striking of their names from the approved roll of Creek freedmen, and that the matter be referred to the District Attorney for the Western District of the Indian Territory for an investigation, and such further action as the premises may warrant the District Attorney in taking after he investigates the matter.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

EWE—SD

EXHIBIT "G."

I. T. D. 22508-1906.

DEPARTMENT OF THE INTERIOR, Y. P.
WASHINGTON, *February* 14, 1907. L. L. B.

L. R. S.

Commissioner of Indian Affairs.

SIR: Referring to your office letter of November 7, 1906 (Land 83247), there is inclosed departmental letter to be forwarded to the Commissioner to the Five Civilized Tribes, authorizing the cancellation of the names of Lucy Ann Turner and her five minor children, Maude, Anna, Willie, and Florence Turner, and Dixey Griswold, opposite Nos. 5650, 5651, 5652, 5653, 5654, and 5655, respectively, upon a partial schedule of Creek freedmen approved by the Department June 16, 1906.

You are requested to take similar action upon the copy of said schedule in your possession.

Local attorney should be advised hereof.

Respectfully, THOS. RYAN,
First Assistant Secretary.

1 inclosure.

35 EXHIBIT "H."

DEPARTMENT OF THE INTERIOR, Y. P.
WASHINGTON, *February* 14, 1907. L. L. B.

I. T. D. 22508-1906.
L. R. S.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: It appears from your letter of August 13, 1906, that Lucy Ann Turner and her five minor children, Maude, Anna, Willie, and Florence Turner, and Dixey Griswold, have been listed upon a partial schedule of Creek freedmen approved by the Department June 16, 1906, opposite roll numbers 5650, 5651, 5652, 5653, 5654 and 5655, respectively.

You inclosed for departmental consideration a motion by the nation's attorney to reopen said case, filed in your office June 25, 1906, and also affidavits in support of such motion.

In your letter you recommended, for reasons stated, that the motion be granted in order that certain testimony might be taken in the case.

In letter of September 17, 1906, submitting affidavits, for reasons fully set out, you found that a further hearing in the case was unwarranted, and recommended that the name of the applicants be stricken from the partial schedule and that this matter be referred to the United States attorney for the western district of Indian Ter-

ritory for such investigation and other action as the premises might warrant.

The Indian Office, in letter of November 7, 1906, submitting your reports, concurred in your recommendations. It stated that it was convinced that Lucy Ann Turner procured the enrollment of herself and her children by false impersonation, and practiced fraud upon your office.

As it is apparent that the names of the applicants were placed upon the schedule by reason of false and fraudulent testimony, your recommendation is concurred in, and you are authorized to strike their names from the partial schedule in your possession. Their names have been stricken from the schedule in the possession of the Department.

The Indian Office has been authorized to take similar action relative to the part of the schedule in its possession.

The papers received with your letters are inclosed, and you are authorized to call the attention of the proper United States attorney to this matter, with a view to the prosecution of guilty parties.

A copy of Indian Office letter is inclosed.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

7 inclosures.

36

EXHIBIT "I."

Creek Roll, Freedmen.

[New-born.]*

Act of Congress Approved March 3rd, 1905. (Public No. 212.)

No.	Name.	Age.	Sex.	Card No.
*	* * * * * *	*		
	Canceled See 15945/1907 Feb. 14, 1907.			
[5650	Turner, Lucy Ann	37	F	1882]*
	Canceled See 15945/1907 Feb. 14, 1907.			
[5651	Turner, Maude	12	F	1882]*
	Canceled See 15945/1907 Feb. 14, 1907.			
[5652	Turner, Anna	18	F	1882]*
	Canceled See 15945/1907 Feb. 14, 1907.			
[5653	Turner, Willie	16	M	1882]*
	Canceled See 15945/1907 Feb. 14, 1907.			
[5654	Turner, Florence	9	F	1882]*
	Canceled See 15945/1907 Feb. 14, 1907.			
[5655	Griswell, Dixey	19	F	1882]*
*	* * * * * *	*		

Department of the Interior,
Washington, D. C., June 16, 1906.
Approved:

JESSE E. WILSON,
Assistant Secretary.

L. R. S

(Copied from roll in the office of the Commissioner of Indian Affairs.)

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* Words and figures enclosed in brackets erased in copy.

37 EXHIBIT "J."

Creek Roll, Creek Freedmen.

[New-born.]*

[Act of Congress Approved March 3rd, 1905. (Public No. 212)]*

No.	Name.	Age.	Sex.	Card No.
*	* * * * *	*	*	
	Canceled Feb. 14/07—322/220–1.			
[5650	Turner, Lucy Ann	37	F	1882]*
	Canceled Feb. 14/07—322/220–1.			
[5651	Turner, Maude	12	F	1882]*
	Canceled Feb. 14/07—322/220–1.			
[5652	Turner, Anna	18	F	1882]*
	Canceled Feb. 14/07—322/220–1.			
[5653	Turner, Willie	16	M	1882]*
	Canceled Feb. 14/07—322/220–1.			
[5654	Turner, Florence	9	F	1882]*
	Canceled Feb. 14/07—322/220–1.			
[5655	Griswell, Dixey	19	F	1882]*
*	* * * * *	*	*	

Department of the Interior,
Washington, D. C., Jun- 16, 1906.
JESSE E. WILSON,
Assistant Secretary.
L. R. S.

(Copied from rolls in the Office of the Secretary of the Interior.)

Demurrer.

Filed January 6, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49891.

THE UNITED STATES ex. Rel. LUCY ANN TURNER et al., Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The petitioners say that the answer filed by respondent in the above entitled cause is bad in substance.

KAPPLER & MERILLAT,
Attorneys for Petitioners.

[* Words and figures enclosed in brackets erased in copy.]

38 NOTE.—One matter to be argued on Demurrer is that the answer sets forth no sufficient reason in law for the cancellation by the Secretary of the Interior of the enrollment of petitioners duly and regularly ordered, the said Secretary being without authority of law to cancel a name duly and regularly placed on the final approved rolls of the Creek Nation.

Order Sustaining Demurrer.

Filed January 17, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 49891.

THE UNITED STATES ex. Rel. LUCY ANN TURNER et al., Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

On consideration of the petitioners' demurrer to the answer of the respondent, it is considered that said demurrer be and the same is hereby sustained this 17th day of January, 1908.

WRIGHT, *Justice.*

Order Directing Mandamus to Issue, Appeal, &c.

Filed January 17, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 49891.

THE UNITED STATES OF AMERICA ex Rel. LUCY ANN TURNER et al., Relators,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Come now here as well the Relators, as the Respondent, by their respective attorneys; whereupon the Relators' demurrer to the answer of the Respondent having been sustained on this 17th day of January A. D. 1908 the Respondent by his attorneys says he will stand upon his answer.

Thereupon, the Court being fully advised, it is considered, ordered and adjudged that the Respondent James Rudolph Garfield, be and he is hereby commanded within twenty days after this date to restore the name of the Relators to the freedmen rolls of members or citizens of the Creek Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to Relators' rights in said Creek Tribe and to recognize Relators as enrolled freedmen members of said tribe

39 The Respondent thereupon in open Court by counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this Court to the Court of Appeals of the District of Columbia, which was allowed, and pending such appeal the judgment is stayed and no writ shall issue thereon against the Respondent.

WRIGHT, *Justice.*

Mandate.

Filed May 25, 1908.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between The United States of America ex Relatione Lucy Ann Turner, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner and Florence Turner, Minors, suing by their mother and next friend, Lucy Ann Turner, petitioners, and James Rudolph Garfield, Secretary of the Interior, respondent, Law No. 49891, wherein the judgment of the said Supreme Court entered in said cause on the 17th day of January, A. D. 1908, is in the following words, viz:

Come now here as well the Relators, as the Respondent, by their respective attorneys; whereupon the Relator's demurrer to the answer of the Respondent having been sustained on this 17th day of January A. D. 1908 the Respondent by his attorneys says he will stand upon his answer.

Thereupon, the Court being fully advised, it is considered, ordered and adjudged that the Respondent James Rudolph Garfield, be, and he is hereby commanded within twenty days after this date to restore the name of the Relators to the freedmen rolls of members or citizens of the Creek Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to Relators' rights in said Creek Tribe and to recognize Relators as enrolled freedmen members of said tribe.

The Respondent thereupon in open Court by Counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this Court to the Court of Appeals of the District of Columbia, which was allowed, and pending such appeal the judgment is stayed and no writ shall issue thereon against the Respondent.

WRIGHT, *Justice.*

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of April, in the year of our Lord

one thousand nine hundred and eight, the said cause came on
40 to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that the said respondent James Rudolph Garfield, Secretary of the Interior, recover against the said petitioners sixty-nine dollars and seventy cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings in accordance with the opinion of this Court.

May 5, 1908.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 23d day of May in the year of our Lord one thousand nine hundred and eight.

Costs of Respondent.

Clerk	$10.40
Attorney	5.00
Printing Record	54.30
	$69.70

Still due Clerk.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Order on Mandate of Court of Appeals, &c.

Filed June 5, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 49891.

THE UNITED STATES OF AMERICA ex Rel. LUCY ANN TURNER et al.,
Petitioners,
vs.
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The Court of Appeals having reversed the judgment of this Court entered on demurrer filed by petitioners to the answer of the respondent in the above-entitled cause with costs, with directions to
41 take further proceedings in conformity to the opinion of the Court of Appeals, as appears by the mandate of said Court of

Appeals here presented by counsel for petitioners, it is by this Court ordered that judgment be entered herein against petitioners for costs adjudged in said Court of Appeals. Therefore, it is considered that the respondent recover against said defendant the sum of $91.15 for his costs aforesaid and that execution issue therefor.

And it is further ordered that the order of this Court entered herein directing that the writ of mandamus issue against the respondent be, and the same hereby is, vacated and for nothing held, and that the demurrer filed herein by petitioners to the answer of respondent to their petition and the rule to show cause issued by the Court thereon be, and the same hereby is, overruled with leave to petitioners to plead over or to take such further steps as they may be advised. And thereupon the petitioners by their counsel in open Court say that they do not care to plead over, but will stand upon their demurrer as originally filed herein, whereupon it is by the Court this 5th day of June, A. D. 1908, ordered that the demurrer aforesaid be, and the same hereby is, overruled and that this cause be, and the same shall, stand dismissed and that final judgment for costs be entered against the petitioners. And thereupon the petitioners in open Court by their counsel noted an appeal to the Court of Appeals from the order of this Court dismissing this their cause and directing that final judgment for costs be entered against them and prayed the Court to fix the bond for costs on appeal, which the Court accordingly did at and in the sum of one hundred dollars bond for costs on appeal, with leave to deposit fifty dollars in currency with the Clerk of the Court in lieu of bond for costs on appeal if so advised.

WRIGHT.

Memorandum.

June 22, 1908.—Appeal Bond approved and filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed June 22, 1908.

In the Supreme Court of the District of Columbia, the 22d Day of June, 1908.

At Law. No. 49891.

THE UNITED STATES ex Rel. LUCY ANN TURNER et al.

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The Clerk of said Court, will please prepare a record on appeal in the above entitled cause, including the record on appeal here-
42 tofore transmitted to the Court of Appeals in this cause & the proceedings herein subsequent to the decision of the Court of Appeals.

CHAS. H. MERILLAT,
Attorney for Petitioner.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 45, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49891 at Law, wherein The United States of America, ex relatione Lucy Ann Turner, &c. et als., are Petitioners, and James Rudolph Garfield, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of July A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1926. The United States of America ex relatione Lucy Ann Turner et al., appellants, vs. James Rudolph Garfield, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Jul- 22, 1908. Henry W. Hodges, clerk.

43 TUESDAY, *March 2d, A. D.* 1909.

No. 1926.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Appellants,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The above entitled cause was submitted to the consideration of the Court on the printed record and briefs filed herein by Messrs. C. J. Kappler and C. H. Merillat, attorneys for the appellants, and by Messrs. D. W. Baker, Stuart McNamara and F. W. Clements, attorneys for the appellee.

TUESDAY, *April 6th, A. D.* 1909.

No. 1926.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Appellants,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The retirement of James Rudolph Garfield and the appointment of Richard A. Ballinger as Secretary of the Interior having been suggested, It is upon motion of Mr. C. H. Merillat of counsel for the appellants now here ordered by the Court that the said Richard A. Ballinger, Secretary of the Interior, be and he is hereby made
44 the party appellee in this cause in the place and stead of James Rudolph Garfield, retired.

45 No. 1926.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Appellants,

vs.

JAMES RUDOLPH GARFIELD, Secretary of the Interior.

Opinion.

(Mr. Justice VAN ORSDEL delivered the opinion of the Court.)

This case, on the same facts and pleadings presented by this appeal, was considered by this Court at the April term 1908, 31 App. D. C., 332.

In the former appeal, the case came here on declaration and answer, and demurrer to the answer. On hearing in the Supreme Court of the District of Columbia, the demurrer was overruled, and from that ruling a special appeal was taken. We reversed the ruling and remanded the case for further proceedings in accordance with the views expressed in our opinion. When the mandate was filed in the Court below, appellants refused to plead over, and elected to stand on their demurrer. Accordingly, a judgment was entered dismissing the action and assessing costs against the petitioner. From this judgment the present appeal is prosecuted.

We find no reason to change or modify our views as expressed in our former opinion. The judgment is therefore affirmed with costs, and it is so ordered.

Affirmed.

No. 1855.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This is an appeal by the Secretary of the Interior of the United States from an order of the Supreme Court of the District of Columbia directing that a writ of mandamus issue commanding him to restore to the rolls of citizenship of the Creek nation the appellees, relators below.

Relators alleged in their petition that they made application, as provided by law, to the Commissioner to the Five Civilized Tribes, to be enrolled as freedmen members of the Creek nation. A hearing was had, at which all the parties were represented by counsel, and relators were duly adjudged to be entitled to enrolment. No appeal was taken by the Creek nation, and, thereafter, relators' names were placed upon said rolls, which were approved by the Secretary of the Interior on June 16, 1906. It is further alleged that, thereafter, upon false representations, the cases of relators were reopened and that respondent's predecessor in office, without notice to them, arbitrarily and illegally undertook to deprive them of their legal rights by directing that their names be canceled from said rolls. It is alleged that the cancellation of relators' names was not noted on all the freedmen rolls of the Creek nation prior to March 4, 1907.

Respondent answered, denying the jurisdiction of the court to consider the matters referred to in the petition, and denying that relators were freedmen members or citizens of the Creek nation, and alleged, upon information and belief, that Lucy Ann Turner procured the enrol-ment of herself and her five minor children, the other relators, by fraud and misrepresentation. Respondent then sets forth in detail the facts upon which the allegation of fraud is predicated, and alleges that an investigation was had by the Commissioner, counsel for relators having notice of the hearing, at which several witnesses were examined and evidence adduced showing that relators were not entitled to enrol-ment. As a result of the hearing, the Commissioner recommended that the names of relators be stricken from the rolls, and the Secretary of the Interior, on February 14, 1907, authorized and directed that the names be canceled from said rolls. It was further alleged that no one of the relators had since been given any allotment or any certificate of allotment; that the action of respondent's predecessor was in accordance with a long established and well recognized practice with respect to the rules

of the five civilized tribes. The answer was verified by respondent upon information and belief. A demurrer to the answer was interposed, which was sustained by the court. The court entered a decree ordering the restoration of relators' names to the rolls. From this judgment, respondent prosecutes this appeal.

It is contended by counsel for respondent that the demurrer constituted an admission by relators of the truth of the allegations of fraud contained in the answer, and that, however meritorious their case, they are not here with clean hands and are, therefore, not entitled to the writ. Co el for relators, on the other hand,
47 insist that since the allegations of fraud contained in the answer were made upon information and belief, and the answer was so verified the demurrer can not be construed as an admission of the charge of fraud contained therein. A brief consideration of this issue will be sufficient for the purposes of this inquiry. It is well settled that facts alleged in an answer or return upon information and belief are sufficient to raise disputed questions of law and fact. United States ex rel. Redfield v. Windom, 137 U. S., 637. It follows, we think, that if such a pleading is sufficient to raise an issue of fact, a demurrer thereto must logically operate as an admission of the facts therein alleged. A demurrer to the answer in an action at law admits all new facts alleged in the answer. In re Sanford Fork & Tool Co., 160 U. S., 247. By "new facts" can be meant only such facts as are well pleaded, material to the issue, and are capable of properly presenting disputed questions of fact.

It, therefore, appears that relators are here admitting that they fraudulently procured their names to be placed upon the rolls and that, upon a hearing and investigation, of which their counsel had notice, their names were stricken from the rolls by an order of respondent's predecessor made prior to March 4, 1907, the date fixed by law for the final completion of the rolls by the Secretary of the Interior. By these admissions, they have divested themselves of every vestige of right to be heard in a court of justice. The machinery of the law may always be set in motion to protect valid property rights, but here no rights exist. Relators admit they are not Creek freedmen, admit they are not entitled to enrol-ment as such, admit that their names were placed upon the rolls through the perjury of the principal relator, and admit that their names were ordered stricken from the rolls prior to March 4, 1907. Their counsel insist that, unless this writ is granted, there is no court to which they can appeal. Under their admissions, no court would admit them. They are not entitled to a hearing. Hence, it is difficult to understand how they can be damaged by the refusal of the writ.

The writ of mandamus is not a writ of right, and will issue only in the exercises of the sound discretion of the court. It will not issue where no right is shown to exist, nor will it issue to perpetuate a fraud. In High on Extraordinary Legal Remedies, sec. 26, it is said: "It is important that a person seeking the aid of a mandamus for the enforcement of his rights should come into court with clean

hands; and when the proceedings have been tainted with fraud and corruption the relief will be denied, however meritorious the application may be on other grounds." A similar rule is announced in Spelling on Injunctions and Extraordinary Remedies, sec. 1380: "While the remedy by mandamus is not equitable, but strictly legal, yet by analogy to the principles prevailing in courts of equity it is a uniform requirement that the relator in seeking this remedy must come into court with clean hands. If the proceedings have been tainted with fraud, or if the relator has through his neglect lost the benefit of a legal remedy to which he was once entitled, relief will be denied, however meritorious the proceedings may be on other grounds." The principles above announced are supported in People v. Assessors, 137 N. Y., 201; People v. Jeroloman, 139 N. Y., 14; Commonwealth v. Henry, 49 Penn. St., 530; State v. Commissioners, 26 Kan., 419; and State v. Graves, 19 Md., 351.

Conceding that the argument of counsel for relator that the Secretary of the Interior had no power to strike these names from the approved rolls is correct, a matter upon which we express no opinion, it is likewise manifest that he had no lawful power, under the admissions of fraud before us, to place the names originally upon the rolls. Hence, we are asked to compel him to perform not only an illegal act, but to now do something he never had power to do. It is elementary that before a writ of mandamus will issue to compel the performance of an act, it must appear that the respondent has power and authority to perform the act sought to be enforced. Hambleton v. Dexter, 89 Mo., 188.

Counsel for relators cite the case of Noble v. Union River Logging Railroad Co., 147 U. S., 170, insisting that it supports their position in this case. With this contention we can not agree. In that case, the court restrained the Secretary of the Interior from canceling a map granting to the company a railroad right of way over public lands of the United States. It was held that, when the maps were approved by the Secretary of the Interior he lost further control of them. The suit was brought to restrain him from canceling the maps after they had been approved. He insisted on his right of cancellation on the ground that his original approval had been procured through fraud. The court held that the Secretary of the Interior, having approved the maps, lost control of the matter and, therefore, had no legal authority to cancel them; and a restraining order was issued to prevent him from the threatened performance of an illegal act.

Mr. Justice Brown, in his opinion in this case, clearly expressed the distinction between the case there under consideration and the one at bar when he said: "If he (the Secretary of the Interior) has no power at all to do the act complained of he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do." A court will restrain by injunction the performance of an unlawful act, or command by writ of mandamus the performance of a lawful act; but it will not restrain the performance of a lawful act or command the performance of an unlawful act. In the case at bar whatever au-

thority, or lack of authority, there may have been for the Secretary of the Interior to act in the premises, he acted; and the enrol-ment was canceled. If, as contended by counsel, he had lost control of the rolls when the cancellation took place he had no lawful authority to cancel the names from the rolls. For the same reason he would have no higher authority to reinstate the names. Hence the writ here sought is to compel the performance of an unlawful act. On the other hand, if it be conceded that the Secretary had not lost control of the rolls at the time the cancellation took place, it must be held that he was acting in the lawful exercise of his discretion, and the writ can not issue to control his action in the premises.

Viewed from any standpoint the writ in this case, upon the facts before us, should be denied. The judgment is reversed, with costs and remanded for further proceedings in accordance with this opinion, and it is so ordered.

Reversed.

48 TUESDAY, *April 6th, A. D.* 1909.

No. 1926. April Term, 1909.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Appellants,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the Record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL.

April 6, 1909.

49 STATE OF OKLAHOMA,
County of Wagoner, ss:

Lucy Ann Turner, being first duly sworn, deposes and says: That she is one of the parties to the cause, entitled, The United States of America Ex Relatione Lucy Ann Turner, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, minors, suing by their mother and next friend, Lucy Anna Turner, vs. Richard A. Ballinger, Secretary of the Interior, pending in the Court of Appeals of the District of Columbia; that she is the mother of Dixey Griswell and Maude, Willie, Ann and Florence Turner; that she is familiar with the allotments of herself and of each of her children aforesaid; that said allotments were selected in part for their value for oil and gas; that she is familiar with the

value of each and every of said allotments, and that in her opinion each and every of said allotments is of the reasonable value of six thousand dollars or more, and some of said allotments have a value considerably in excess of this amount; that this stated amount is exclusive of any payments that might be due to deponent and each of her children in the event that they should be finally held entitled to enrollment in the Creek Nation of Indians.

LUCY ANN TURNER.

Subscribed and sworn to before me this 19 day of April, A. D. 1909.

ROBERT A. ROSS,
Notary Public.

[NOTARIAL SEAL.]

My commission will expire July 1, 1912.

50 STATE OF OKLAHOMA,
County of Wagoner, ss:

William L. Turner, being first duly sworn, deposes and says: That he is the husband of Lucy Ann Turner and father of Dixey Griswell and Maude Willie, Anna and Florence Turner, parties to a certain suit pending in the Court of Appeals of the District of Columbia, entitled, The United States of America Ex Relatione Lucy Ann Turner, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, minors, suing by their mother and next friend, Lucy Ann Turner, vs. Richard A. Ballinger, Secretary of the Interior; that this deponent is familiar with the allotments of his wife and each and every of their children hereinbefore named; that deponent personally visited the lands and selected the allotments after making considerable inquiries and obtaining advice as to their value; that each and every of said allotments was selected in part for its value for oil and gas; that deponent is familiar with values in the vicinity where each and every of these allotments is located; that he is familiar with and able to speak regarding the value under a clear title of the allotments of each and every of the parties hereinbefore named, Lucy Ann Turner, Dixey Griswell, and Maude, Willie, Anna and Florence Turner; that to the best of deponent's information, knowledge and belief the value of each and every of these allotments is in excess of six thousand dollars, and some of said allotments have a value of $10,000; that this is exclusive of whatever sums will come to each and every of the parties hereinbefore named out of the tribal funds of the Creek Nation in the event that they are enrolled as freedmen citizens of the Creek Nation of Indians; that what the tribal funds and undivided lands will amount to deponent at this time is unable to state, but there is in the Treasury of the United States, as deponent is informed, more than three and one-half millions of dollars to the credit of the Creek Nation of Indians; that there is considerable unallotted land which will have to be sold, and that the Creek Nation of Indians
51 have claims against the United States aggregating a number of millions of dollars; that in deponent's opinion the enroll-

ment of the parties hereinbefore named is worth at this time to each and every of the petitioners considerably more than six thousand dollars.

WILLIAM L. TURNER.

Subscribed and sworn to before me this 19 day of April, A. D. 1909.

[NOTARIAL SEAL.] ROBERT A. ROSS,
Notary Public.

My commission expires July 1, 1912.

(Endorsed:) No. 1926. The United States of America ex rel. Lucy Ann Turner et al., Appellants vs. Richard A. Ballinger, Secretary of the Interior. Affidavits as to value. Court of Appeals, District of Columbia. Filed Apr. 28, 1909. Henry W. Hodges, Clerk.

52 TUESDAY, *May 11th, A. D.* 1909.

No. 1926.

THE UNITED STATES OF AMERICA ex Relatione LUCY ANN TURNER, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner and Florence Turner, Minors, Suing by Their Mother and Next Friend, Lucy Ann Turner, Appellants,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

On motion of Mr. C. H. Merillat, of counsel for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America, ex relatione Lucy Ann Turner, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, minors, suing by their mother and next friend, Lucy Ann Turner, Appellants, and Richard A. Ballinger, Secretary of the Interior, Appellee, a manifest error hath happened, to the great damage of the said Appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of May, in the year of our Lord one thousand nine hundred and nine.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

54 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Lucy Ann Turner, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner and Florence Turner, minors, suing by their next friend Lucy Ann Turner, as principals, and Theodore Block, as surety, are held and firmly bound unto Richard A. Ballinger, Secretary of the Interior, in the full and just sum of three hundred dollars to be paid to the said Richard A. Ballinger, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of May, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between The United States of America ex relatione Lucy Ann Turner, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner and Florence Turner, minors, suing by their mother and next friend Lucy Ann Turner, appellants, vs. Richard A. Ballinger, Secretary of the Interior, a judgment was rendered against the said appellants and the said appellants having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard A. Ballinger, Secretary of the Interior, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said appellants shall prosecute said writ of error to effect, and an-

swer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LUCY ANN TURNER. [SEAL.]
DIXEY GRISWELL. [SEAL.]
MAUDE TURNER,
WILLIE TURNER, AND
ANNIE TURNER,
FLORENCE TURNER,
By Their Nearest Friend, LUCY ANN TURNER. [SEAL.]
THEODORE BLOCK. [SEAL.]

Sealed and delivered in the presence of—
W. D. HALFHILL.
J. C. JOHNSON.
WM. E. AMBROSE, as to Theodore Block.

This bond is satisfactory to the def't in error.

STUART McNAMARA,
Of Counsel.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1926. The United States of America ex relatione Lucy Ann Turner et al., Appellants, v. Richard A. Ballinger, Secretary of the Interior. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 25, 1909. Henry W. Hodges, Clerk.

55 UNITED STATES OF AMERICA, *ss:*

To Richard A. Ballinger, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America, ex relatione Lucy Ann Turner, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, minors, suing by their mother and next friend Lucy Ann Turner are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 25th day of May, in the year of our Lord one thousand nine hundred and nine..

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted this 25th day of May, A. D. 1909.

DANIEL W. BAKER,
U. S. Att'y.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 25, 1909. Henry W. Hodges, Clerk.

56 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 55, inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America ex relatione Lucy Ann Turner, Dixey Griswell and Maude Turner, Willie Turner, Anna Turner and Florence Turner, minors, suing by their mother and next friend Lucy Ann Turner, appellants, vs. Richard A. Ballinger, Secretary of the Interior, No. 1926, April Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 25th day of May A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,708. District of Columbia Court of Appeals. Term No. 234. The United States of America ex relatione Lucy Ann Turner, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner and Florence Turner, minors, suing by their mother and next friend, Lucy Ann Turner, plaintiffs in error, vs. Richard A. Ballinger, Secretary of the Interior. Filed June 2d, 1909. File No. 21,708.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 60.

THE UNITED STATES OF AMERICA EX RELATIONE LUCY ANN TURNER, DIXIE GRISWELL, AND MAUDE TURNER, WILLIE TURNER, ANNA TURNER, AND FLORENCE TURNER, MINORS, SUING BY THEIR MOTHER AND NEXT FRIEND, LUCY ANN TURNER, PLAINTIFFS IN ERROR,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

CHAS. H. MERILLAT,
CHAS. J. KAPPLER,
JAMES K. JONES,
W. D. HALPHILL,
Attorneys for Plaintiffs in Error.

J. D. GILLIS & SONS, LAW PRINTERS, 613 E STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 60.

THE UNITED STATES OF AMERICA EX RELATIONE LUCY ANN TURNER, DIXIE GRISWELL, AND MAUDE TURNER, WILLIE TURNER, ANNA TURNER, AND FLORENCE TURNER, MINORS, SUING BY THEIR MOTHER AND NEXT FRIEND, LUCY ANN TURNER, PLAINTIFFS IN ERROR,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This cause comes to the court on writ of error from an order and judgment by the Court of Appeals of the District of Columbia affirming, with costs, a judgment entered by the Supreme Court of the District of Columbia dismissing a petition for mandamus against the Sec-

retary of the Interior filed by plaintiffs in error with costs (Rec. p. 44). There previously had been proceedings by which the Supreme Court of the District of Columbia had sustained a demurrer filed by the plaintiffs in errors, petitioners in the trial court, and had directed mandamus should issue against defendant in error, but the Court of Appeals (p. 45) had reversed this judgment of the trial court.

Statement of the Case.

The instant case differs from the Allison and Goldsby cases heretofore decided by this court and the Lillie Lowe case, advanced to be heard with the instant case, in that in those cases the parties whose names were stricken, or attempted to be stricken from the rolls, had been issued allotment certificates prior to the attempted cancelation of their names from the roll, whereas in the instant case the Turners were not notified of their enrollment and not permitted to select allotments of land until after cancellation proceedings were taken and their names stricken from the rolls, they having at the time of the institution of the present suit been allowed for the first time to make tentative selections of allotments, to depend upon the result of the present proceedings.

The case differs from the Lillie Lowe case in that in the Lowe case the parties had notice and an opportunity to be heard; in many respects it agrees with the Goldsby and Allison cases in that the plaintiffs in error had no opportunity to be heard or adduce testimony in their behalf, differing, however, from the Allison and Goldsby cases in that they were informed on the day testimony was taken to cancel their enrollments testimony was to

be taken at once, but they were not represented by counsel, their attorney being sick and they themselves not being notified even at that late hour of the reopening and rehearing. They were not permitted to cross examine witnesses or adduce testimony in their own defense, the defendant in error summarily holding there was no reason for permitting them to make defense and denial of the ex parte testimony taken under his directions and the Dawes Commission summarily closing the rehearing without opportunity of defense to the plaintiffs in error.

The case comes here on the pleadings, consisting of the petition, with annexed exhibits, the answer, with annexed exhibits, demurrer to the answer, and the orders and opinion of the courts below thereupon.

By the averments of the petition, filed October 29, 1907, it appears that plaintiffs in error were duly and regularly enrolled June 16, 1906, on the final roll of Creek freedmen, the roll being regularly approved on that date by the Assistant Secretary of the Interior authorized to act for the Secretary (p. 7). This enrollment was made after testimony regularly taken under the rules and practice of the Commission to the Five Civilized Tribes in the month of July, 1904. In these proceedings the plaintiffs in error were represented by two attorneys practicing before the Commission who were intermarried citizens of the Creek Nation (p. 6) and the Creek Nation by its national attorney, M. L. Mott. They were represented throughout the proceedings leading up to their final enrollment by these two attorneys, and after all testimony either side desired to offer had been adduced a decision was rendered by the Commission to the Five Civilized Tribes (p. 12) holding the plaintiffs in error entitled to enrollment as Creek freedmen who had

lawfully removed to the nation from the State of Tennessee, where they had formerly resided, and that they were children or grandchildren of a Creek freedwoman, Mary Ann Grayson, on the Dunn Roll, a roll confirmed by law (p. 4). Notice of this decision rendered January 12, 1906, was sent the next day to the attorney for the Creek Nation (p. 13), and he was given fifteen days from date within which to protest against the enrollment, the rules and regulations in enrollment matters (p. 6) providing for notice with right of protest or appeal to all parties in enrollment matters. No appeal was taken from the decision and, as stated, the enrollment of petitioners then was duly and regularly approved June 16, 1906.

The petition avers that the plaintiffs in error were freedmen citizens and residents of the Creek Nation, and "lawful descendants of a freedwoman, long recognized as a citizen or freedman member of said Creek tribe" (p. 3). It also avers "they did not procure any false testimony in their behalf," in the enrollment proceedings (p. 8) and that they never did inform either of their attorneys "or any other person whosoever that they had or could procure false testimony in their behalf," this averment being made in view of the motion and affidavit on which their case had been reopened.

It avers that under the rules and regulations and practice notice was required to be given to all parties concerned of all steps affecting their rights, and that proceedings in enrollment matters should be conducted in accordance with the practice of the common law so far as applicable (p. 6). That subsequent to their enrollment one of their attorneys became Assistant Attorney for the Creek Nation and as such charged with the spe-

cial duty of keeping freedmen off the Creek rolls, and the other of their attorneys, a law clerk or attorney for the Commission to the Five Civilized Tribes in the Creek Enrollment Division. That subsequent to the placement of their names on the approved final rolls by the Secretary of the Interior, and after all jurisdiction of the Secretary over the matter of their enrollment had ceased and determined, (p. 8) the Secretary of the Interior without any notice to them of the motion permitted the attorney for the Creek Nation to move to reopen and there was reopened the matter of the final enrollment of the plaintiffs in error (p. 8). That this motion was not in accord with the rules and regulations and practice of the Commission to the Five Civilized Tribes and the Secretary of the Interior, in that it set forth no facts, nor any newly discovered evidence. This motion was filed June 25, 1906 (p. 13) and alleged that the moving attorney had that day just learned enrollment of plaintiffs in error had been procured through fraud, having been that day informed by one of their original attorneys that while acting as their attorney he had "discovered that they were not entitled to enrollment and that they were perpetrating a fraud upon the Commission to the Five Civilized Tribes," and that he "withdrew from said case and so notified the Commissioner to the Five Civilized Tribes." (Note: As there is no paper in the record or files of withdrawal it must have been verbal if given.) It further states that the moving attorney for the Creek Nation had been informed by the attorney for the enrolled parties that when he withdrew from the case of plaintiffs in error he informed the plaintiffs in error they were not entitled to enrollment, and that he was informed "they have abandoned the case and returned to Texas"

(p. 14). No notice of this motion was served on or given to the plaintiffs in error (p. 8). Subsequently, and likewise without any notice to plaintiffs in error, one of their former attorneys signed and there was filed with the Commission to the Five Civilized Tribes an affidavit (p. 8) "alleging that your petitioners' enrollment had been procured by means of false testimony," and further alleging that "your petitioners (plaintiffs in error here) had abandoned their case as the attorney was informed and had left the Indian Territory for Texas." The petition of the plaintiffs in error alleges (p. 8) "that this affidavit is wholly untrue and false. That your petitioners never as matter of fact did inform the said Merrick or the said Lieber or any other person whosoever that they had or could procure false testimony in their behalf. Your petitioners allege that they did not procure any false testimony in their behalf. They further allege that they never did abandon their case or claim to citizenship, and they further allege that the affidavit is wholly untrue and false wherein it is alleged that petitioners had removed to the State of Texas, the fact being that ever since the year 1901 your petitioners had lived at Wagoner, I. T., about fourteen miles from Muskogee, where the said Merrick lived and where was the chief office of the Commission to the Five Civilized Tribes, which place was known to the said Merrick and to the said Commission to the Five Civilized Tribes to be the residence of your petitioners."

The petition alleges no notice (p. 9) whatsoever was given them of the motion to reopen or of the affidavit and that they had no opportunity to reply thereto when they learned their case had been reopened. It alleges that not hearing from their application for enrollment and

the fact of their final enrollment not being communicated to them, they had employed one W. D. Halfhill as attorney to ascertain the status of their case, and finally learned they had been enrolled, but not until too late to select allotments as provided by law because notification of their final enrollment was delayed until their case was reopened. That they employed W. D. Halfhill as their attorney, but without waiving any rights as having been finally enrolled. That the Creek Nation employed as attorney to conduct the proceedings against them one of their attorneys in their original enrollment. That this attorney gave them no notice of the time and place of his proposed hearing in respect to the cancelation of their enrollment, but August 22, 1906, took testimony against them without any opportunity to them to contest the same or to be represented by attorney. That the record shows this said attorney had the following notation made upon the testimony he took: "The office of J. B. Campbell and the office of W. D. Halfhill were communicated with and the said attorneys could not be found. J. G. Lieber called at the office of W. D. Halfhill and was notified that he was sick" (Lieber being their former attorney).

The petition alleges that Campbell never was attorney for petitioners and that Halfhill was sick in bed when Lieber took testimony in their case August 22, 1906 (p. 24), the communication to Halfhill's office being that same day. The petition alleges that Halfhill requested the hearing be postponed on account of his sickness, but the request was refused by Lieber and also by the Commission to the Five Civilized Tribes "so that your petitioners had no opportunity to be represented by counsel nor were they represented in person." It states that

through their attorney they requested the witnesses should be recalled for cross-examination, and that their attorney, they are advised, understood the opportunity would be afforded him before the case was closed, but that the case was closed without an opportunity for them to cross-examine the witnesses produced by the Creek Nation, and without an opportunity to introduce evidence on their own behalf."

It alleges "that after they learned what had been done they filed affidavits denying the truth of the allegations made against them and asked an opportunity to have the case reopened, but the same was denied. It then avers that "thereafter the Secretary of the Interior arbitrarily and illegally undertook to deprive your petitioners of the rights by law vested in them and issued an order directing that the names of your petitioners should be canceled," and alleges that the rolls were mutilated by the striking of their names and the marking opposite their names "Canceled February 14, 1907." It avers demand that they be permitted to select lawful allotments and to share in Creek tribal funds, and that they be restored to the rolls and the cloud on their rights removed, but that the Secretary had refused their demand and would not permit them to do other than make a tentative notation of the lands they desired to select in the event the cancelation of their enrollments was held illegal by the courts.

The answer to this petition denied the jurisdiction of the court in the premises and denied petitioners were freedmen citizens of the Nation or had been legally enrolled. Counsel have treated this as being a matter of law and controlled by the averments of fact of the pleadings as ruled by this court in the Goldsby and Allison cases.

The answer did not deny the averments of the petition of lack of notice of the proceedings for the reopening of the case of the plaintiffs in error, that it was reopened upon affidavit of their former attorneys and without notice or opportunity to them to oppose the same, that testimony was taken without their being represented by counsel, that petitioners were given no opportunity to cross-examine the Government's witnesses or to adduce testimony in their behalf, and that they had no notice of the taking of the testimony or sworn statements of the witnesses against them except that the office of their counsel was communicated with on the day the sworn statements of these witnesses were taken and that it was found their counsel was sick. It also did not deny their counsel had been advised he would be given an opportunity to cross-examine, but that the case had been summarily closed, without opportunity of defense accorded plaintiffs in error. It likewise did not deny that after plaintiffs in error learned of what had been done they had filed affidavits denying the truth of the allegations against their enrollment, and had unsuccessfully sought to have the matter reopened.

The answer admitted the original enrollment of petitioners as alleged in the petition and the motion and affidavits to reopen and rehear the matter on the ground of fraud, and attached these motions, affidavits, sworn statements of witnesses and action upon the reopening proceedings as exhibits to the answer (p. 16). It alleged that because the motion to reopen asserted an attempt had been made to influence testimony in behalf of the plaintiffs in error it had been deemed advisable to procure the immediate attendance of witnesses in order no opportunity might be afforded to influence the testimony of

these witnesses. It averred that August 22, 1906, these witnesses had testified before the Dawes Commission in the presence of an attorney for the Creek Nation "but though an endeavor was made to secure the attendance of said Halfhill and Campbell, applicant was not represented at said hearing." It set forth a report stating that in view of the testimony of these witnesses it was deemed "further hearing in this case is unnecessary," that it was decided the plaintiffs in error had been fraudulently enrolled and that authority should be granted to strike their names from the approved roll of Creek freedmen, and that the matter be referred to the United States District Attorney for action.

The answer alleged that September 15, 1906, one William W. Wright had filed affidavits in support of an application to reopen the case and "which affidavits controverted the allegations of fraud made in said affidavit of E. L. Merrick," but that as the testimony was deemed conclusive of fraud in the opinion of the Office of the Commissioner of Indian Affairs, that office on November 7, 1906, concurred (p. 34) in the recommendation of the Commission to the Five Civilized Tribes that the names be stricken from the rolls. It then set forth that this recommendation had been adopted by the Acting Secretary of the Interior February 14, 1907 (p. 36) and the names had been stricken or canceled from the rolls, and asserted that at the time the names were stricken none of the plaintiffs in error had made any selections of land as their allotments and had not received then or since an allotment or an allotment certificate.

It alleged that the action of the predecessor in office as Secretary of the Interior of the respondent, who was James Rudolph Garfield, who had succeeded Ethan A.

Hitchcock, "was in accordance with his long-established and well recognized practice with respect to the rolls of the Five Civilized Tribes," the rolls showing that several hundred names had been stricken "from said approved partial lists or schedules for said reasons with or without notice as the exigencies of each case seemed to demand." It alleged that "there was no law, rule or regulation requiring the giving of notice and opportunity to be heard in such cases." The answer concluded: "And your respondent further says that as he is informed and believes the enrollment of said Lucy Ann Turner and her said children was procured by fraud and such relataors are not freedmen members or members by blood or intermarriage of the Creek Nation and are not legally or equitably entitled to participate in the allotment and distribution of the lands and other property of the Creek Nation."

Attached, as stated, to the answer, were the motions to reopen and the statements of so-called testimony taken, at which several persons stated, after having been sworn, that Lucy Ann Turner, the eldest of the plaintiffs in error, was not the daughter of Mary Ann Grayson. Some of these witnesses were step-children of Mary Ann Grayson. The children seemed to have been called by various names, nick names or other and Mrs. Grayson to have had two sets of children. The rolls containing the name of Lucy Ann Turner state her as being thirty-seven years old. One of the witnesses testified that Lucy Ann Turner had informed her she was twenty-six years old. Two of the witnesses alleged that efforts had been made but that these efforts had not been successful improperly to induce them to testify that Lucy Ann Turner was related to them. The testimony is to be

found in the record, pages 24 to 34, and the action on the same from pages 34 to 37. The roll containing the names of the plaintiffs in error is at page 37 of the record.

Demurrer was filed to the answer (p. 38) as bad in substance, and following the rule of the Supreme Court of the District of Columbia, which requires only one matter to be argued on demurrer to be set forth as a note to the demurrer and permits any other additional matters of demurrer to be argued also, stated that the answer set forth no reason in law for the cancelation, duly ordered, of the enrollment of the petitioners, because the Secretary was without authority of law to cancel a name duly and regularly placed on the final approved rolls.

This demurrer was sustained January 17, 1908 (p. 39), and the defendant in error (respondent below) standing on the answer, mandamus was ordered to issue, and an appeal was taken to the Court of Appeals of the District of Columbia. That court reversed the trial court on the ground that by their demurrer (p. 45) plaintiffs in error had admitted they were guilty of fraud in procuring their enrollment, and hence that they had no rights in court which the court would recognize, not coming there with clean hands; also that if the Secretary had no power to strike their names from the rolls, then he had no power to put them back; that as they had been guilty of fraud, as they admitted by their demurrer the Secretary was without lawful power to have placed them on the rolls and the court therefore was being asked to compel the defendant in error to perform an illegal act and one he never had power to do; that if the Secretary had lost control of the rolls when the cancelation took place, he likewise was without power to reinstate the names.

The cause was remanded and an order was entered (p. 41) overruling the demurrer of plaintiffs in error who, standing upon the demurrer, final judgment dismissing their petition with costs was entered against plaintiffs in error, from which final judgment an appeal was taken to the Court of Appeals, and that court (p. 44), confirming this final judgment, a writ of error was sued out to this court (p. 48).

Statement of Laws Applicable.

The laws applicable to enrollment and allotment in the Creek Nation will be found set forth in the record at pages 2 to 6, inclusive. They do not differ in any material respect from the laws with reference to the Choctaw, Chickasaws and Cherokees, heretofore considered by this court and now before the court in the case of Lillie Lowe. The Creeks held their lands by a title identical with that held by the Choctaws, Chickasaws and Cherokees, namely, a fee simple title in exchange subject to a bare possibility of reversion, which possibility had ceased and determined by the operation of the laws with reference to division in severalty of the lands of the Five Civilized Tribes.

The Creek freemen by the Treaty of June 14, 1866 (p. 2) were specifically given the same rights as native Creeks "including an equal interest in the soil and national funds."

The laws with reference to the Five Civilized Tribes are identical, except the tribal agreements made in 1902 with the Choctaws, Chickasaws, Cherokees and Seminoles and the agreements with the Creeks, the original agreement being approved March 1, 1901 (31 Stats. L.

861), and the Supplemental Agreement approved June 30, 1902 (32 Stats. L. 500). While differing somewhat in language and details, the Creek agreements are in essence and substance the same as the agreements with the other of the Five Civilized Tribes, separate tribal agreements being made.

With reference to the matter of citizenship material here the original Creek agreement of 1901, Section 28, provides:

> "The rolls so made by said Commission when approved by the Secretary of the Interior shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

The method of making up the rolls and of allotment of lands was identical with that pursued as to the other Five Civilized Tribes and the laws passed subsequent to the tribal agreements in 1901 and 1902 with each separate tribe applied alike to all the Five Civilized Tribes.

By Section 3 of the Creek Agreement of 1901 it was provided:

"All lands of said tribe, except as herein provided, (this exception referring to non-allottable lands), shall be allotted among the citizens (the word citizen being defined in Section 1 to mean a member of the tribe) of the tribe by said Commission so as to give each an equal share of the whole in value as nearly as may be in manner following: There shall be allotted to each citizen one hundred and sixty acres," etc.

One hundred and sixty acres valued in appraisement at six dollars and fifty cents per acre was made the stand-

ard value of an allotment in the Creek tribe, and any allottee receiving lands of less than standard value was to have the difference made up to him in money, all tribal funds and surplus lands being declared to be held for this purpose.

By Section 4 allotments were directed to be made by parents, guardians or curators for minors and incompetents. By Section 6 allotments made to Creek citizens by the Commission prior to ratification of the agreement, as to which there were no contests, were confirmed to the allottees, and the Commission was directed to continue its work of allotment to citizens as theretofore.

By Section 23, immediately after the ratification of the agreement it was directed that the Secretary of the Interior should furnish the principal chief blank deeds and that the principal chief should thereupon execute deeds to each citizen who had selected or might thereafter select his allotment, which was not contested, a deed to the lands embraced in his allotment certificate. Nine months was given for contests.

Section 7 provided:

> "Creek citizens may rent their allotments *when selected* for a term not exceeding one year and after receiving title thereto, without restriction," etc. (Italics ours.)
>
> "Sec. 38. After any citizen *has selected his allotment* (italics ours) he may dispose of any timber thereon," etc.

By the Supplemental Creek Agreement of 1902 it was provided:

> "Sec. 9. If the rolls of citizenship provided for by the Act of Congress approved March 1, 1901

> (the original agreement) shall have been completed by said Commission prior to the ratification of this agreement, the names of children entitled to enrollment under the provisions of Sections 7 and 8 hereof shall be placed upon a supplemental roll of citizens of the Creek Nation and said supplemental roll *when approved by the Secretary of the Interior shall in all respects be held to be a part of the final rolls of citizenship of said tribe.*" (Italics ours.)

By Section 16 of this agreement it was declared that—

> "if for any reason such selection (of homesteads) be not made for any citizen it shall be the duty of said Commission to make selection for him."

By Section 20 any prior agreements, laws or treaties in conflict with the supplemental agreement were repealed.

Assignments of Error.

1. That the court below erred in affirming the judgment of the Supreme Court of the District of Columbia overruling the demurrer of plaintiff in error and dismissing with costs their petition in mandamus.

2. That the court below erred in not directing that judgment should be entered in favor of plaintiffs in error directing that mandamus should issue compelling their restoration to the roll of Creek freedmen with full recognition of their rights as enrolled tribal members.

3. That the court below erred in holding that by their demurrer the plaintiffs in error admitted their enrolment had been procured by fraud and were barred thereby from a judgment in mandamus in their favor.

4. That the court below erred in holding in substance that the defendant in error as Secretary of the Interior had jurisdiction to cancel their names from the tribal roll and that if he had not jurisdiction to cancel their names it would be to compel him to do an illegal act and one beyond his power for the courts to compel him to reinstate their names on the roll and recognize them as full tribal members.

5. That the court below under the record in this case erred in holding that the plaintiffs in error had notice and hearing prior to the cancelation of their names from the rolls and in not holding that the constitutional right of plaintiffs in error to due process of law had been denied them and that the cancelation of their names from the rolls was without authority of law and therefore defendant in error should be compelled to restore their lawful status as duly enrolled and approved tribal members.

6. That the court below erred in not holding that the proceedings whereby the names of plaintiffs in error were canceled from the tribal roll were without the jurisdiction of the Secretary of the Interior and a denial of due process of law and in holding that plaintiffs in error by demurrer to the pleading of these ultra vires and unconstitutional proceedings had admitted fraud had been perpetrated in their enrolment because there were sworn statements and findings of fraud set forth in these illegal proceedings and in the summary of them in the answer.

ARGUMENT.

It is contended by counsel for plaintiffs in error that the record discloses that their names were canceled from the rolls without hearing or opportunity to defend, and

that while the court below speaks of a hearing in their case, the term in a legal sense is used unadvisedly and misleads in view of the conceded facts in the record that the Secretary of the Interior summarily canceled their names from the roll and denied them opportunity to adduce testimony in their behalf or to cross-examine the so-called witnesses for the Government. The case, it is contended, is controlled in legal principle by the decision of this court in the case of Garfield vs. N. S. ex rel Goldsby 211 U. S., 255, wherein this court said:

"The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

This court further in the Goldsby case said:

"The question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case."

The question involved in the Goldsby case counsel respectfully submit with all due deference to the opinion of the learned court below is the question involved here —the crux, on legal principle, of the controversy.

It is respectfully submitted that on legal principle the question of pleading and the allegation of fraud on which the learned court below sought to bar plaintiffs in error from the courts is not and cannot be of the essence of the controversy—in a sentence that if it be found that the proceedings whereby the names of plaintiffs in error

were canceled from the Creek rolls were without due process of law and a denial thereof that a demurrer to an answer setting up a summary of these unconstitutional proceedings with the assertions of fraud contained in them, and concluding with an averment that as informed and believed (obviously from these illegal proceedings) fraud in opinion of defendant in error was perpetrated by plaintiffs in error is not an admission by plaintiffs in error of fraud in fact, but a legal assertion by demurrer of the proposition that cancelation of their enrolment by invasion of the constitutional rights of plaintiffs in error and by the exercise of unlawful power after jurisdiction was exhausted was not warranted or authorized by law, but was an arbitrary abuse of power and no answer in law to the petition of plaintiffs in error. That those proceedings were a nullity, though claimed otherwise by the officer in charge of enrolments and allotments, and the matters of evidence and findings set up in them ill pleaded as not constitiuting a defense to an action for arbitrary, unwarranted and unlawful deprivation of property rights.

The court below in effect says: Even if due process of law and your constitutional rights were violated and you complain thereof and bring your action to set aside these illegal and unconstitutional proceedings, you shall not be heard until you purge yourself of the charges in these unlawful proceedings. Assume the burden of proof that should be the government's, prove yourself innocent, and then maybe we will listen unto you, but until you do, we will accept it that you admit yourself guilty and admit the truth and verity of the contents of these ultra vires and unconstitutional sworn statements and decisions. It is placing the cart before the horse; it is usurping the functions of the equity courts.

By approval of the rolls containing their names plaintiffs in error under the statute became entitled immediately to select one hundred and sixty acres of land and to share in the tribal funds. The lands selected, plaintiffs in error being unrestricted citizens, became immediately transferable divisible and descendible; A vested property interest. The statute made the rolls when approved by the Secretary final rolls. It confers nowhere powers of cancellation, statutory executive discretion was exhausted with enrollment. All subsequent executive acts looking to cancellation were unlawful.

Counsel have heretofore in the Goldsby briefs previously filed and in the Lillie Lowe case, argued with this case, set forth fully their contention with respect to the finality of the rolls of each of the Five Civilized Tribes after approval by the Secretary of the Interior.

The instant case differs from those cases only in that in those cases allotment certificates had issued.

It is respectfully submitted that the arguments made in opposition to any power in the Secretary of the Interior to cancel a name on a roll after said roll had been duly and regularly approved by the Secretary of the Interior where allotment certificates had issued applies with equal force to the Secretary's right and power in the premises where the party had not been permitted to select an allotment prior to the attempted cancelation of the name and where he had an unexercised right to select a tract of land.

This court in the Goldsby case held that by the conceded action of the Secretary prior to the striking of Goldsby's name from the rolls he had become entitled

to participate in the distribution of the funds of the Nation and also had prior thereto received a certificate conclusively evidencing his right to the particular tract of land he had selected.

Neither expressly nor impliedly had the Secretary any power thereafter to strike Goldsby's name from the rolls. This was because as an executive officer his power was to be derived from the statutes and the statutes gave him no such authority. If he had no such authority it was not because the cancelation was subsequent to the issuance of the allotment certificate, because the statutes with reference to his right of cancelation are as silent as to cancelation prior to allotment certificate as to cancelation subsequent to the issuance of allotment certificates.

The allotment certificate under the statute simply evidenced that the party had selected and had become vested with an individual personal right in a particular segregated tract of land. Prior to that the party had an undivided interest in the entire tribal landed estate, and equally an interest, undivided even as yet, in the tribal funds. This was a property right, a vested property interest, inasmuch as it was a thing saleable, divisible and descendible. The fact part of this undivided property interest had been improved and become divisible did not alter the property character of the interest. An undivided interest, as a tenant's in common, is of equal lawful right against invasion with a divided interest, it is respectfully submitted. As such it was not subject to cancelation except in a court of equity. Enrollment was in effect the execution of a contract or agreement between the individual, the Indian nation of which the individual was a political part, and the United States—this contract being the result of a convention assented to

by the United States and the other parties. "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity."—Atlantic Del. Co. vs. James, 94 U. S., 207; Connor vs. Groh, 90 Md., 686.

By the staute and also the uniform practice of the commission and its rules and regulations, as soon as a party was placed on an approved roll he became under Section 3 of the Creek Agreement entitled to be allotted an equal share, namely, one hundred and sixty acres of land of a value of six dollars and fifty cents per acre, with all other tribal citizens. If he did not select this land, then it was the duty of the Government to make the selection for him. If he had improvements upon a particular tract, the moment enrolled he became entitled to a preferential right to choose this particular tract and after nine months (unless as a result of a contest a better preferential right were established in some other person) he came entitled absolutely and conclusively to the particular tract. The selection he made was a subject of sale if the selector were not a restricted Indian upon the moment of selection. McWilliams Inv. Co. vs. Livingston 98 Pac. 914.

The right acquired was a right arising by a vast partition proceeding. It was, therefore, founded upon a stronger and higher consideration than that parties acquired by payment of money and issuance to them of receivers' certificates under the public lands laws. It was unlike a receiver's certificate under the public land laws in that under the public land laws by express statute the Secretary of the Interior has power to cancel prior to patent a receiver's certificate. He had no such express power, nor any necessarily implied from his duties with reference to the right the party acquired by enrollment;

namely, the right to select an allotment. Even receivers' certificates cannot be canceled without a hearing.

Cornelius vs. Kessel, 128 U. S., 456.

The Creek Agreement, Section 28, provides:

> "The rolls so made by said Commission when approved by the Secretary of the Interior shall be the final rolls of citizenship of said tribe upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

The United States evidently contemplated that all enrollments in the Creek Nation would have been completed by June 30, 1902, for it provided by Section 9 that if the roll "shall have been completed by said Commission prior to the ratification of this agreement" the names of children should be placed on a supplemental roll, which should be a part of the final rolls of citizenship of the tribe.

It must be evident that these provisions were inconsistent with a power or an intention on the part of Congress that the rolls might be upset and the action of yesterday disaffirmed to-morrow. There would be no security of title and of rights; no reliance on the Government records and no probability of an early closing of matters such as Congress was endeavoring to force in order the land might be all divided in severalty and Oklahoma fitted for Statehood under any such supposition as an implied power of undoing judgments once pronounced by this special inferior tribunal. As an inferior tribunal the Secretary of the Interior was strictly limited by law, and all his proceedings must be strictly in conformity to law.

That Congress intended enrolments and allotments should proceed pro tanto and that the Secretary had not a continuing power of reopening the rolls until they were finally closed, is, we think, evidenced by Section 6 of the Creek agreement of 1901, which confirms all allotments made, in fact, prior to the agreement where there was no contest and by Section 23, which directed immediate issuance of deeds to the allottees, who were in fact actually allotted while the agreement was pending but not yet a law. Does not this spell the intention of Congress to hasten matters and that enrolments and allotments should be final as fast as approved? Is it possible Congress would cause deeds to issue if there was an intention the Secretary might revise the rolls until the rolls were complete and close to all applicants for citizenship? Yet this is the Secretary's contention, and he has undertaken to cancel enrolments and allotments even after patents or deeds have issued.

The statute declared the rolls approved to be final rolls. The word "final" was construed by this court in Johnson vs. Towsley, 13 Wall., 83. In that case the Act of June 12, 1858, as to pre-emption contracts had provided—

> "that appeals from the decision of the district officers in cases of contest between different settlers this right of pre-emption shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final unless appeal therefrom be taken to the Secretary of the Interior."

This court held that the word "final" meant that—

> "with the single exception of an appeal to the Secretary of the Interior his (the Commission-

er's) decision should preclude further inquiry in that department."

It is respectfully submitted that when Congress declared the rolls when approved by the Secretary of the Interior shall be final rolls of citizenship upon which distribution of lands and moneys should be made, it meant that with the approval of the Secretary of the Interior the matter was *final*, not interlocutory or tentative or preliminary, and that thereafter his jurisdiction had ceased and determined.

It did not, of course, mean that the courts of equity exercising their usual powers as courts of equity could not be resorted to in any exceptional and extraordinary cases.

Wallace vs. Adams, 143 Fed., 716.
Germania Iron Co. vs. U. S., 165 U. S., 379.

It is stare decisis in this court that enrollment conferred a right—a property right or privilege. Also that property could not be destroyed without notice and a hearing.

In the Goldsby case this court as seen, squarely decided enrollment conferred right of participation in lands and funds and that it could not be destroyed without notice or hearing.

It is respectfully submitted that under the conceded record in this court there has been no hearing. Counsel respectfully submit that the court below, when in its opinion it speaks of a notice and a hearing before can-,celation, must be using the terms, not in their legal sense, and that legally speaking the language of the court is misleading.

The record concedes that subsequent to enrollment the plaintiffs in error had no notice of the motion or affidavit upon which, and by means of which, their cases were reopened. It admits that prior to the day the statements of witnesses were taken intended to impeach the verity of the proceedings by which they had been enrolled, they received no notice of the intention to take testimony in their case; that all that occurred that day was, without any notice to the plaintiffs in error themselves, the office of their attorney was communicated with, and their attorney being found sick, the legal representatives of the United States over the protest of this attorney and in his absence, and without any one being present to represent plaintiffs in error, took certain sworn statements of certain witnesses. It admits that request was made for an opportunity to cross-examine these witnesses and to adduce testimony in refutation of their statements and that this privilege was denied plaintiffs in error and their counsel, and that their names were summarily stricken from the rolls on the ground that the exparte statements taken were conclusive against them. It was a wholly summary proceeding and when, after the matter was forwarded to Washington by the Commission, the plaintiffs in error filed affidavits denying the truth of the statements alleged against them and sought to have the matter reopened and an opportunity of defense accorded them, the same was denied them.

It is respectfully submitted that this does not constitute due process of law and does not constitute notice and a hearing, even if, as seen, all that is meant by due process of law is notice and a hearing. It is submitted that due process of law in addition to notice and a hearing also means a hearing before a tribunal authorized by

law to conduct the proceedings it undertakes; that arbitrary assumption of a power by a tribunal and proceedings by it without jurisdiction are not due process of law, and that where the tribunal has jurisdiction its action is not due process of law if it refuses the accused a right to put in his defense.

In Hovey vs. Elliott, 167 U. S., 414, this court said:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

In McVeigh vs. United States, 11 Wall., 259, the court said:

> "The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no locus standi in that forum. * * * The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

In Windsor vs. McVeigh, 93 U. S., 277, the court said:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle

> of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party. Appear and you shall be heard; and when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard."

In Dent vs. West Virginia, 129 U. S., 124, the court said:

> "The great purpose of the requirement of due process of law is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

It is, therefore, respectfully submitted that due process of law under the conceded facts in the petition and the answer thereto of the Secretary of the Interior has been denied to plaintiffs in error.

By their demurrer plaintiffs in error did not admit fraud. They admitted merely illegal and unconstitutional exparte proceedings by Federal officials acting outside their authority. They admitted that these unlawful proceedings had informed the successor as Secretary of the Interior of the Secretary who had taken these proceedings that persons had testified before the precedent secretary fraud had been used and that the answering respondent believe the verity of these proceedings. Plaintiffs in error had sworn positively there was no fraud. Their demurrer did not admit, it is contended, fraud, but only that certain illegal proceedings had been taken and certain statements made therein. Their case differs from those mandamus authorities where the plaintiffs own petition and statement admitted fraud or the equivalent or showed there was no legal right, and hence, a discretion in the trial court.

The defendant in error contended, and the court below ruled, that by the demurrer the plaintiffs in error here had admitted enrollment had been procured by fraud. The court below grounds its opinion upon the assertion that by demurrer—

> "relators admit they are not Creek freedmen, admit they are not entitled to enrollment as such, admit that their names were placed upon the rolls through the perjury of the principal relator."

and therefore holds that—

> "no court would admit them. They are not entitled to a hearing."

It is respectfully submitted that the court below has erred as to the admissions made by the demurrer of plaintiffs in error.

If the proceedings taken by the Secretary of the Interior were proceedings taken after his authority and jurisdiction in the premises had been exhausted, then those proceedings are a nullity—of course, except as they might be taken for his information and as a basis for some independent and legal proceedings warranted by due course of law.

Noble vs. Union Logging Co., 147 U. S., 170.

If they were taken without a hearing they amount to nothing and the pleading of the same cannot in law be a good defense, and the demurrer does not admit them to be a good defense, but concedes merely that if it be true these illegal findings were made and these unwarranted and hence unlawful sworn statements given by so-called witnesses, they do not in law constitute a good defense to the facts stated in the petition of plaintiffs in error. The recitation of the so-called evidence and the findings thereon is not a pleading of facts, as in Redfield vs. Windom 137 U. S., 637, but a recitation of some irrelevant and illegal proceedings and evidence.

To hold otherwise would be to hold that although there was denial of due process of law, these proceedings could not be cast aside as unconstitutional and the party stand on what was lawful, but that by indirection the unlawful result could be secured and the party, although vested with rights could be compelled to prove those already vested rights and that they had been lawfully acquired before he could be heard in court. It would be to say you must prove your innocence of charges before

we are responsible for our denial to you of due process of law. It would invert the theory of our jurisprudence.

The plaintiffs in error who, as given vested rights by regular proceedings, must be made defendants before these rights could be forfeited would be compelled to be plaintiffs, and to assume the burden of proof as such before they can have any lawful standing. They would have to prove their right, already vested, by a preponderance of evidence that it was a lawful and not a fraudulent right, whereas enrolled parties have a right in equity to insist their enrolment shall be set aside only upon the most clear and convincing proof of fraud or gross mistake and by an appropriate judicial proceeding.

U. S. vs. Winona & C. Ry., 165 U. S., 463.
St. L. Smelting Co. vs. Kemp, 104 U. S., 666.
U. S. vs. Budd, 144 U. S., 154.

It is respectfully submitted that this would not be law in the due, and regular course of its administration, and that it is as true in this case as in the criminal case of Clyett vs. U. S., 197 U. S., 223, that "only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

As to the pleadings the rule is that it is not sufficient to charge fraud generally, but that the facts showing the fraud must be distinctly set forth and not evidence tending to show there was fraud, and, the charges then must be proved by clear and satisfactory evidence.

Lalone vs. U. S., 164 U. S., 255.

When respondent after setting up the unwarranted proceedings winding up in cancelation added: "Your

respondent further says that, *as he is informed and believes*, the enrolment of said Lucy Ann Turner and her children was procured by fraud," plaintiffs in error by their demurrer did not admit any matter of fact but merely admitted an opinion, or belief, obviously a conclusion from the precedent narrative.

By their demurrer they admitted that Mr. Garfield believed they were fraudulently enrolled. They admit he was *informed* that they were fraudulently enrolled. They did not admit that his belief was correct nor that his information was accurate. They, in their petition, specifically denied the same. Mr. Garfield averred no personal information on the subject. All that he stated was but hearsay or opinion. And it was hearsay or opinion after the fact, the event, for as he admits by not denying the averments of the petition, and as the court knows judicially, he was not Secretary of the Interior or connected with that department of the Government when the names of plaintiffs were stricken from the rolls.

There is, therefore, in the instant case every reason to apply the doctrine set forth in Ency. Pl. & Prac., Vol. 13, p. 723, that "according to the weight of authority denials in the return or answer must be positive and not on information and belief," and the further rule (same page) that "in the return to a mandamus facts are to be stated and not evidence," and the further rule that the return or answer must have a high degree of certainty and is to be construed most strongly against the respondent (Ency. Pl. & Pr., Vol. 13, p. 716; Harwood vs. Marshall, 10 Md., 464.

Moses on Mandamus, page 210, says: The return must be good, tested by the ordinary rules of plead-

ing, both in form and substance. It must either deny the facts stated in the writ, on which the claim of the relator is founded, or must state other facts sufficient in law to defeat the relators' claim, and these facts should be stated positively and distinctly; and if instead of stating facts the return merely sets out or refers to matters of evidence from which these facts are inferred, it is objectionable, citing, among other, the following: Upon a return to a mandamus to the canvassers of an election that they rejected certain election returns because they were not made according to the statute, it was held proper to order the respondents to state the defects specifically, that the court might judge of them.

People vs. Baker, 35 Barbour (N. Y.), 105.

The return should state facts and not evidence and should be certain to a common intent.

Com. ex rel. Middleton vs. Comsrs. Allegheny Co., 37 Penna. St., 237.

Argumentative inferences in a return, or sworn allegations which are merely constructive deductions, cannot be treated as presenting distinct issues of fact. Respondents are bound to return plain and direct answers to all the material allegations in a writ of mandamus, and in this light every part of the return is to be judged. If a confession and avoidance for a plea of fraud be intended all the necessary facts should be distinctly stated and not left to inference.

Where the return fails to answer the important facts alleged in the petition every intendment and presumption will be made against it.

People vs. Kilduff, 15 Ill., 502.

The authorities cited by the court below and by defendant in error in his brief below are all cases where fraud was admitted or made out by petitioners' own pleadings or the admitted *facts,* or where parties were standing on a small legal technicality opposed to manifest intent or justice and, as a rule, where had the mandamus been granted, a public wrong would have been occasioned without possibility or practicability of redress. They therefore are not applicable to the case at bar.

In Peo. vs. Judge Sup. Ct., 41 Mich., 31, the petitioner's own pleadings showed he had been "culpably dilatory" in the language of the court.

Macoupin Co. vs. Peo., 58 Ill., 195, was a case where it was held that the petition showed a mere evasion of the law and a fraud *per se* in that there was an agreement to sell $20,000 worth of certain bonds for two dollars because the law would not permit a donation.

Ansonia vs. Studley, 67 Conn., 180, was a case of discretion in a judge and therefore not a subject for mandamus.

State vs. Graves, 19 Md., 352, was a proceeding to compel delivery of certain building materials in the line of a street whose widening was provided for by an act of the Baltimore municipal council, the body charged with the duty agreeing to deliver and receive pay for the same on the day when prepared to give possession. Before condemnation was concluded the councils repealed the street act and mandamus was sought to compel perseverance in the widening of the street. Held no rights save an inchoate right possibly had been acquired, that the relator had a remedy at law against the city, if damnified and that the city had a right for purposes of public policy to recede from the proposed condemnation proceedings.

State vs. Comsrs., 26 Kan., 419, was a county seat question and the report shows was decided on the ground that under the law the Commissioners could look behind one roll to certain other rolls they had to determine whether a petition for county seat relocation had the requisite number of names.

People *ex rel* Wood vs. Board of Assessors, 137 N. Y., 201, was a case where W owned certain land taxed at $2,506. He sold part and the tax assessors apportioned $194 to the part sold to H and $2,312 to the residue. The apportionment was properly entered in the assessors records, but their clerk in transcribing the records for the purpose of certifying the taxes as thus apportioned to the collector of taxes, by mistake transposed the taxes. The relator W had knowledge of all these facts and of the mistake "and for the purpose and with the intention of escaping" his just share of taxes, went to the collector of taxes and without disclosing the mistake paid the collector $194 and received a receipted bill therefor. H discovered the mistake and obtained from the Board of Assessors a certificate showing the true apportionment, and when the collector refused to correct his books compelled him to do so by mandamus so as to conform to the original apportionment. Thereafter W's ground was advertised for sale for non-payment of the true amount and he sought mandamus to compel cancelation of the tax on the ground that the correction and alteration of the books was unauthorized. The Court held against him, saying: "The writ will be granted to prevent a failure of justice, but never to promote manifest injustice. It is a remedial process and may be issued to remedy a wrong, not to promote one, to compel the discharge of a duty which ought to be performed, but not

to compel the performance of an act which will work a public and private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud. The relator must come into Court with clean hands, and he cannot invoke this extraordinary remedy, as in this case, to evade the payment of his just portion of a tax by taking and claiming *the advantage of a confessed mistake."*

People vs. Jerolman, 139 N. Y., 17, was a case where a party to legal proceedings obtained vacation of a stipulation and certain advantages by a motion based on a claim certain statutes applied and then having obtained these advantages sought to obtain others by claiming just the reverse and the Court refused by mandamus to control the discretion of the trial court.

Com. vs. Vandyke & Henry, 49 Pa. St., 530.

This was a case where an ordinance of Philadelphia provided that the mayor "be, and he hereby is, authorized to execute" leases for coal lands of the Girard estate to such "persons as may be accepted by the superintendent of the estates" under the supervision of the committee of the estate. Vandyke & Henry were accepted by the superintendent under the supervision of the committee, and when the mayor refused to execute the lease on the ground he had a discretion as to execution of the same and that bribery and corruption had preceded its submission to him, mandamus was sought to compel him to execute the lease. The Court refused and held the mayor did not have simply a ministerial duty to perform and was not commanded by the ordinance to execute any lease the superintendent might accept, but played an important and independent part and was the final person in actual power as to whether a lease should be made or not.

The Court also found, on the testimony of Vandyke & Henry themselves, that they had bribed the subordinate officials and that the Court hence should not be the instrument "to carry into execution a rotten and unsound bargain, especially where it affects an important private trust."

The Court found the proposed lessees did not have a specified and fixed legal right, but simply an inchoate contract and that "their title *to have* a lease depended on their fairness in procuring themselves to be presented as proper parties to receive it"—whereas in the instant case the relators have been adjudged proper parties and have received enrolment, but it is sought to keep them from the judgment they have obtained by *ex parte* affidavits on statements merely *without opportunity to them to defend* that they had procured the judgment of enrolment by false testimony.

The petition squarely denied any false testimony was given or any fraudulent means used to obtain enrolment, and when the answer set up *ex parte* so-called testimony, it raised no issue of material or pertinent fact and the demurrer was no admission of fraud.

The plaintiff in error has no remedy but mandamus. If the enrolment were fraudulent defendant has a remedy, that of a suit to cancel enrolment, for just as a patent to land can be canceled for fraud, so enrolment can be similarly canceled.

Germania Iron Co. vs. U. S., 165 U. S., 379.

Merrill on Mandamus, Secs. 62 to 64, says the writ in the United States is a writ of right, and that where a party is entitled to a right, though it be in the discretion

of the Court, still, being a right, it can not be said to be discretionary on the part of the Court. The Court will consider all the circumstances, reviewing the whole case with due regard to the consequences of its action. It will consider the exigency, the nature and extent of the wrong or injury which will follow a refusal of the writ. The writ is described as the right arm of the law. Its principal office is not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary lawsuits or equitable proceedings.

The opinion of the Court below in its statement that under the pleadings the defendant in error had no lawful power to enroll plaintiffs in error originally and that the mandamus proceedings seek to compel him to do an illegal act and to do something he never had power to do confuses jurisdiction and correctness of exercise of jurisdiction. The Secretary of the Interior had jurisdiction expressly conferred on him to consider applications for enrolment and to approve enrolments. This conferred jurisdiction and power; exercise of the right was a power he had; correctness or otherwise of its exercise is but a matter of wisdom and not of power.

Foltz vs. St. L. R., 19 U. S. App., 581.

Errors in the exercise of jurisdiction does not mean an absence of lawful power to do the act authorized.

McNitt vs. Turner, 16 Wall., 564.

The closing suggestion in the opinion of the Court below that if the Secretary exhausted jurisdiction with enrolment the Court has no power to compel undoing of

the act; that if he had lost control over the roll before cancelation the courts have no power to compel him to restore the same is logically and legally unsound. It repudiates this Court's action in the Goldsby and Allison cases. Those cases are its refutation.

In conclusion it may be stated that the United States has admitted the soundness of our position as to the lack of executive authority as to allotments once evidenced by certificates of allotment by suits recently brought to cancel allotment certificates in U. S. vs. Whitmire, 188 Fed., 422, and in the U. S. vs. Carlile, now pending before U. S. District Judge Campbell in the Eastern District of Oklahoma.

Respectfully submitted,

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CHAS. J. KAPPLER,
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Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES OF AMERICA EX relatione Lucy Ann Turner, Dixey Griswell, and Maude Turner, Willie Turner, Anna Turner, and Florence Turner, minors, suing by their mother and next friend, Lucy Ann Turner, plaintiffs in error,

v.

WALTER L. FISHER, SECRETARY OF THE Interior.

No. 60.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case is similar to the Goldsby and Allison cases (211 U. S., 249, 264), in that it is a proceeding by mandamus in the Supreme Court of the District of Columbia to compel the Secretary of the Interior to restore the names of the relators to the

approved rolls of freedmen members of the Creek Nation, one of the Five Civilized Tribes of Indians in the Indian Territory, they having been stricken therefrom by order of one of his predecessors on March 4, 1907.

The present case, however, differs materially from the Goldsby and Allison cases, in that here the element of fraud is presented. In those cases the issue, independent of the jurisdictional questions, was as to the authority of appellant's predecessor to strike names from the approved rolls of the Choctaw and Cherokee Nations without notice and opportunity to be heard being afforded the persons concerned, within the time fixed by law for the completion of the rolls of the Five Civilized Tribes, but no question of fraud was involved in either case.

In the present case matter of fraud in the enrollment of the relators is clearly and distinctly presented. In this case, also, none of the relators have ever made any selection of land or received an allotment certificate or patent, as in the Goldsby and Allison cases.

The petition in this case alleged in substance that the relators made application to the Commissioner to the Five Civilized Tribes to be enrolled as freedmen members of the Creek Nation, and that upon the hearing regularly had thereon, at which the attorney for the Creek Nation was present, they were adjudged by said commission to be entitled to en-

rollment; that no appeal was taken by the Creek Nation from said decision, and that thereafter their names were placed on the rolls of Creek freedmen, which was approved by the Assistant Secretary of the Interior under the authority of the Secretary (R., 1–7); that subsequently, however, upon representations falsely made by the original attorney for the relators, the relators' cases were reopened, without notice to them, and that thereafter appellant's predecessor arbitrarily and illegally undertook to deprive them of their legal rights by ordering the cancellation of their names from said rolls, although it is averred that the marks of cancellation were not noted on all the freedmen rolls of the Creek Nation prior to March 4, 1907 (R., 9, 10).

The Secretary filed an answer (R., 15), in which, after alleging want of jurisdiction in the court over the matters referred to in the petition, and denying that the relators were freedmen members or citizens of the Creek Nation, or legally enrolled as such, it was averred, in substance, that the records of the Interior Department showed that the principal relator, Lucy Ann Turner, procured the enrollment of herself and her five minor children, the other relators, by representing that she was the daughter of one Mary Ann Grayson, whose name appeared on the roll of Creek freedmen made by J. W. Dunn, afterwards confirmed by the act of Congress of June 28, 1898, section 21 (30 Stat., 495, 503); that a motion to reopen their cases was made

by the attorney for the Creek Nation on the ground that the relators had procured their enrollment through fraud, which motion was supported by an affidavit of E. L. Merrick, the original attorney for the relators; that thereafter the Commissioner to the Five Civilized Tribes investigated the matter, the effort they made, without success, to secure the attendance of counsel for relator, and in that connection examined Mitchell Grayson and Dolly Stidham, who were shown to be children of said Mary Ann Grayson, and others, who testified that Lucy Ann Turner was not the daughter of said Mary Ann Grayson; that in view of the testimony so adduced the commissioner recommended that the names of the relators be stricken from the rolls, in which the Acting Commissioner of Indian Affairs concurred; and that on February 14, 1907, the Secretary of the Interior, by his first assistant, acting upon the report of the Acting Commissioner of Indian Affairs, authorized and directed the cancellation of names of relators, and that, as the respondent was informed and believed, the names of said persons were actually stricken from all the copies of said rolls prior to March 4, 1907 (R., 16, 17, 18).

The answer further alleged that at the time and since the names of said relators were stricken from the rolls no one of them, nor anyone for or by them, had been given any allotment or received any allotment certificate. (R., 18.)

The answer further alleged that the action of respondent's predecessor was in accordance with a long-established and well-recognized practice with respect to the rolls of the Five Civilized Tribes. (R., 18.)

Respondent further alleged, upon information and belief, that the enrollment of relators was procured by fraud and that they were not freedmen members, or members by blood or intermarriage of the Creek Nation, and were not legally or equitably entitled to participate in the land allotments of the Creek Nation. (R., 18.)

To the answer a demurrer was interposed. (R., 38.)

The District Supreme Court sustained the demurrer and ordered the restoration of the names of the relators to the rolls, but that pending the determination of an appeal no writ would issue. (R., 38, 39.)

This judgment was reversed by the Court of Appeals, and the case remanded for further proceedings, in an opinion rendered by Justice Van Orsdel, in which it was held that relators were not entitled to the relief sought because of the admission of fraud in their enrollment made by their demurrer to respondent's answer. (R., 45–48.)

The relators electing to stand upon their demurrer, the Supreme Court of the District entered final judgment, in accordance with the mandate of the Court of Appeals, overruling the demurrer and

dismissing the suit with cases against them. (R., 41–42.)

This final judgment was affirmed by the Court of Appeals (R., 44), whereupon this writ of error was sued out (R., 50).

ARGUMENT.

Relators are not entitled to the aid of the extraordinary writ of mandamus because their enrollment was procured by fraud.

The element of fraud in the enrollment of relators plainly distinguishes this case from the Goldsby and Allison cases, heretofore decided by this court (211 U. S., 249, 264).

The answer of respondent alleges specifically, upon information and belief, that "*the enrollment of said Lucy Ann Turner and her said children was procured by fraud,*" as well as that they were not "freedmen members or members by blood or marriage of the Creek Nation." (R., 18.)

In addition, the answer shows that the action of respondent's predecessor in striking the names of relators from the rolls was taken after it had been found, upon investigation, that the enrollment of relators had been procured by fraud. (R., 17.) The testimony adduced at the reinvestigation of the relators' case by the Commissioner to the Five Civilized Tribes clearly shows that he was justified in reaching the conclusion that the enrollment of re-

lators had been procured by fraud. (Exhibit E, R., 24, 34.)

By their demurrer, upon which they have elected finally to stand, relators admit the allegation of fraud, as well as that they are not members of the Cherokee Nation. (*In re Sanford Fork & Tool Co.*, 160 U. S., 247, 257.)

As pointed out by the Court of Appeals, it is well settled that facts alleged in an answer or return upon information and belief are sufficient to raise an issue of fact. (R., 46.)

Counsel contend that by their demurrer they merely admit that the respondent *believed* that relators had procured their enrollment by fraud. Manifestly such a construction of the answer is unwarranted. The allegation is direct and specific that the enrollment of relators was procured by fraud. The fact that such allegation was made upon information and belief does not alter the character of the charge, but merely shows the basis therefor. Respondent could not make the averment upon his own knowledge because he was referring to the acts of his predecessor.

In *United States ex rel. Redfield* v. *Windom* (137 U. S., 636, 640, 646), this court recognized the necessity for a public officer alleging facts as to official action upon information and belief in a return of this kind, where they were not his personal acts. In that case a petition for a writ of mandamus was filed against Mr. Windom, as Secretary of the

Treasury, to compel him to deliver to the relator a certain Treasury draft to which he claimed to be entitled under transactions had mainly with the preceding Secretary of the Treasury. The Supreme Court of the District of Columbia denied the petition, and its judgment was affirmed by this court, which said (ib., pp. 640, 646):

> *The facts stated in the return are averred mainly upon information and belief, as they occurred under a former Secretary, the predecessor of the respondent.* * * * *We think that this return showed sufficient cause for a discharge of the rule and a refusal to issue the writ. It certainly raises disputed questions of law and fact* as to the amount of the actual indebtedness of the United States to Mitchell; as to his agreement that the draft should not be delivered until the claims of the subcontractors, mechanics, and material men should be satisfied out of the proceeds of said draft; as to whether the remission of the forfeiture was absolute or conditional; as to the validity of such agreement; and as to the legal effect of Mitchell's nonfulfillment of the contract. We concur with the court below that these disputed questions of law and fact should not be tried in this proceeding; and that this is not a case in which the power of the court should be exercised.

Counsel, it is understood, attempt to distinguish the case just cited from the one at bar upon the

ground that in that case the Secretary alleged *facts*, upon information and belief and not his mere opinion. But the allegation in this case is also of a fact, namely, that "the enrollment of said Lucy Ann Turner and her said children was procured by fraud."

Even if a general allegation of fraud in an answer would not be sufficient, as a matter of strict pleading, the court will observe that we have much more in this case. The answer shows that respondent's predecessor struck the names of relators from the rolls because the principal relator, Lucy Ann Turner, had procured the enrollment of herself and her children, the other relators, by falsely representing that she was the daughter of one Mary Ann Grayson, whose name appeared on one of the Creek freedmen rolls. (R., 17, 24, et seq.) The averment in the answer that the enrollment of relators was procured by fraud necessarily had reference to the particular facts showing fraud thereinbefore stated, although we submit it is specific enough in itself. The court can not fail to be satisfied upon this record that the enrollment of the relators was procured by fraud, and in that view will hardly require such niceties of pleading upon an application for the extraordinary writ of mandamus as might be required in an ordinary action at law, especially where the result would be to perpetuate wrong and injustice.

It is well settled, as held by the Court of Appeals in this case, that a court of law, following the rule in equity, will not lend its aid by the extraordinary writ of mandamus to enforce rights fraudulently acquired.

High's Extraordinary Legal Remedies, section 26:

> It is important that a person seeking the aid of a mandamus for the enforcement of his rights should come into court with clean hands; and when the proceedings have been tainted with fraud and corruption, the relief will be denied, however meritorious the application may be on other grounds.

Merrill on Mandamus:

> SEC. 68. * * * The writ will be refused when the proceedings have been tainted with fraud and corruption or with illegality. * * *
>
> SEC. 71. * * * The court, acting under its discretion, and endeavoring only to enforce justice, will not allow this writ to be used as an instrument to work injustice. * * *
>
> SEC. 72. Proceeding on the principle that the court will, under this writ, so far as it can, furnish the means of substantial justice, the court will refuse to issue it when justice will not be subserved thereby. * * *

Spelling on Injunction and other Extraordinary Remedies (2):

> SEC. 1371. But even where a clear legal right is shown, the exercise of jurisdiction to

grant this extraordinary remedy rests, to a considerable extent, within the sound discretion of the court, subject, however, to the well-settled principles which have been established by the courts or fixed by statute; and evidence will usually be received, upon request of the respondent, to show that the writ should not issue. * * *

When it is said that granting or refusing the writ rests in the discretion of the court, it is not meant that the court's discretion is absolute, because where a clear legal right to a writ of mandamus is shown, the court has no discretion about granting the writ. And yet the court may refuse it, even though warranted by the rules of law, if hardship or injustice would result to the opposite or to third parties from granting it.

SEC. 1380. While the remedy by mandamus is not equitable but strictly legal, yet by analogy to the principles prevailing in courts of equity *it is a uniform requirement that the relator in seeking this remedy must come into court with clean hands. If the proceedings have been tainted with fraud*, or if the relator has through his neglect lost the benefit of a legal remedy to which he was once entitled, *relief will be denied, however meritorious the proceeding may be on other grounds.*

In *People* v. *Assessors* (137 N. Y., 201, 204) it appeared that the relator took advantage of a mistake in the entry of a tax assessment against his property to evade the amount of tax properly due

by paying the lesser amount charged by such mistake. Subsequently the collector corrected the mistake and relator's property was advertised for sale for nonpayment of the tax less the amount paid by him. It was held that under these circumstances a peremptory writ of mandamus would not lie to compel the cancellation of the tax on the ground that the collector had no authority to correct his books. The Court of Appeals said:

> But there is still a further ground upon which the decision below can be upheld, even if we assume there was a technical want of adequate authority to make the alteration and correction complained of. The writ of mandamus is not always demandable as an absolute right, and whether it shall be granted or not frequently rests in the discretion of the court. (*The State ex rel.* v. *Commissioners of Phillips Co.*, 26 Kansas, 419; *People* v. *Hatch*, 33 Ill., 9, 134; *People ex rel. Sherwood* v. *Board of Canvassers*, 129 N. Y., 360.) The writ will be granted to prevent a failure of justice, but never to promote manifest injustice. *It is a remedial process and may be issued to remedy a wrong, not to promote one; to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud. The relator must come into court with clean*

> *hands,* and he can not invoke this extraordinary remedy, as in this case, to evade the payment of his just portion of a tax by taking and claiming the advantage of a confessed mistake. Even if he had no other remedy he should be left to his own devices to escape the burden honestly resting upon him, and the court may properly refuse to aid him by compulsory process.

In *People* v. *Jeroloman* (139 N. Y., 14, 17), in which a writ of mandamus was refused, the Court of Appeals, speaking by Mr. Justice Peckham, said:

> A mandamus is only granted in the sound discretion of the court. This discretion is not, of course, a capricious or arbitrary exercise of the power of the court to refuse relief even in a proper case. *Where, however, it appears that with reference to the very question at issue the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief by mandamus, the court may, in the exercise of its discretion, refuse the writ.* (*People ex rel.* v. *Board of Assessors, etc., of Brooklyn,* 137 N. Y., 201, and cases cited.)

See also to the same effect:

> *Commonwealth* v. *Henry,* 49 Pa. St., 530, 538.
>
> *State* v. *Commissioners of Phillips Co.,* 26 Kans., 419.
>
> *State* v. *Graves,* 19 Md., 351.

Macoupin County v. *The People,* 58 Ill., 191.

People v. *Ketcham,* 72 Ill., 212.

Borough of Ansonia v. *Studley,* 67 Conn., 170.

People v. *Judge of Superior Court,* 41 Mich., 31.

State v. *Jersey City,* 42 N. J. Law, 94.

State v. *Home Street Ry. Co.,* 43 Nebr., 830.

It is unnecessary to consider whether relators had sufficient opportunity to be heard in the cancellation proceedings. Having by their demurrer admitted that their enrollment was procured by fraud, and having elected to stand thereon, they are not entitled to the extraordinary writ of mandamus in enforcing any rights so secured, to the injury of the Cherokee Nation.

The judgment of the Court of Appeals should therefore be affirmed.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

NOVEMBER, 1911.

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UNITED STATES OF AMERICA, EX REL. TURNER *v.* FISHER, SECRETARY OF THE INTERIOR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 60. Argued November 14, 1911.—Decided December 4, 1911.

Where, under the provisions of acts of Congress, and after a hearing, the names of relators were duly entered as Creek Freedmen by blood on the rolls made and approved by the Secretary of the Interior, rights were acquired of which the freedmen could not be deprived without that character of notice and opportunity to be heard essential to due process of law. *Garfield* v. *Goldsby*, 211 U. S. 249.

Notice to the attorney of such freedmen, given a few hours before the hearing of a motion to strike their names, on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process. *Roller* v. *Holly*, 176 U. S. 399, 409; *Hagar* v. *Reclamation Dist.*, 111 U. S. 708; *Iowa Central* v. *Iowa*, 160 U. S. 393; *Hovey* v. *Elliott*, 167 U. S. 414.

In the absence of other controlling facts, the Secretary of the Interior could have been required by mandamus to restore the names of those thus arbitrarily stricken off without notice. *Garfield* v. *Goldsby*, 211 U. S. 249.

But mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.

Although the petition for the writ alleged that relators were freedmen duly enrolled and denied the truth of the testimony on which their names were stricken off, yet where the answer of the Secretary referred to that testimony and alleged, "on information and belief, that the relators were not freedmen members or members by blood

or marriage of the Creek Nation, and that their enrollment had been procured by fraud," a defense was stated, proof of which would have defeated the right to a restoration of relators' names, even though they had been improperly stricken from the rolls without due process. *Redfield* v. *Windom*, 137 U. S. 636, 646; *In re Sanford Co.*, 160 U. S. 257.

Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused. *In re Sanford Co.*, 160 U. S. 257.

To have issued the writ would have involved the useless thing of requiring relators' names to be reëntered, and in other proceedings having their names stricken because the original enrollment had been procured by fraud, thus admitted by the demurrer.

31 App. D. C. 332; 33 App. D. C. 195, affirmed.

IN error from a judgment of the Court of Appeals of the District of Columbia affirming an order of the lower court refusing to issue a writ of mandamus requiring the Secretary of the Interior to restore the names of relators to the Freedmen Rolls of the Creek Nation, from which they had been stricken. 31 App. D. C. 332, 33 Id. 195.

Mr. Chas. H. Merillat, with whom *Mr. Chas. J. Kappler*, *Mr. James K. Jones* and *Mr. W. D. Halfhill* were on the brief, for plaintiffs in error:

The case is controlled by *Garfield* v. *Goldsby*, 211 U. S. 255.

By approval of the rolls containing their names plaintiffs in error under the statute became entitled immediately to select one hundred and sixty acres of land and to share in the tribal funds. The lands selected, plaintiffs in error being unrestricted citizens, became immediately transferable, divisible and descendible; a vested property interest. The statute makes the rolls when approved by the Secretary final rolls. It confers nowhere powers of cancellation, statutory executive discretion having been exhausted with enrollment. All subsequent executive acts looking to cancellation were unlawful. *Atlantic Del. Co.* v.

James, 94 U. S. 207; *Connor* v. *Groh*, 90 Maryland, 686; *McWilliams Inv. Co.* v. *Livingston*, 98 Pac. Rep. 914; *Cornelius* v. *Kessel*, 128 U. S. 456; Creek Agreement, § 28.

The statute declared the rolls approved to be final rolls. See *Johnson* v. *Towsley*, 13 Wall. 83.

It is *stare decisis* in this court that enrollment confers a right—a property right or privilege: also that property cannot be destroyed without notice and a hearing.

The notice given and proceedings taken by the Secretary in this case do not constitute due process of law and do not constitute notice and hearing. Due process of law in addition to notice and hearing also means a hearing before a tribunal authorized by law to conduct the proceedings it undertakes; arbitrary assumption of a power by a tribunal and proceedings by it without jurisdiction are not due process of law, and where the tribunal has jurisdiction its action is not due process of law if it refuses the accused a right to put in his defense. *Hovey* v. *Elliott*, 167 U. S. 414; *McVeigh* v. *United States*, 11 Wall. 259; *Windsor* v. *McVeigh*, 93 U. S. 277; *Dent* v. *West Virginia*, 129 U. S. 124.

By their demurrer plaintiffs in error did not admit fraud. They admitted merely illegal and unconstitutional *ex parte* proceedings by Federal officials acting outside their authority. They had sworn positively there was no fraud. Their case differs from those mandamus authorities where the plaintiff's own petition and statement admitted fraud or the equivalent showed there was no legal right, and hence, a discretion in the trial court.

Plaintiffs in error having been given vested rights by regular proceedings, must be made defendants before those rights can be forfeited. *Lalone* v. *United States*, 164 U. S. 255.

By their demurrer they admitted that Secretary Garfield believed they were fraudulently enrolled. They admit he was informed that they were fraudulently enrolled.

They did not admit that his belief was correct nor that his information was accurate. They, in their petition, specifically denied the same. Secretary Garfield averred no personal information on the subject. All that he stated was but hearsay or opinion. And it was hearsay or opinion after the fact, the event, as he admits by not denying the averments of the petition, and as the court knows judicially, he was not Secretary of the Interior or connected with that department of the Government when the names of plaintiffs were stricken from the rolls. 13 Ency. Pl. & Prac., p. 723; *Harwood* v. *Marshall*, 10 Maryland, 464; Moses on Mandamus, p. 210.

Argumentative inferences in a return, or sworn allegations which are merely constructive deductions, cannot be treated as presenting distinct issues of fact. *People* v. *Kilduff*, 15 Illinois, 502.

The authorities cited by the court below and relied upon by defendant in error are all cases where fraud was admitted or made out by petitioners' own pleadings or the admitted facts, or where parties were standing on a small legal technicality opposed to manifest intent or justice and, as a rule, where mandamus was granted, a public wrong would have been occasioned without possibility or practicability of redress. They therefore are not applicable.

Mr. Assistant Attorney General Harr for defendant in error:

Relators are not entitled to the aid of the extraordinary writ of mandamus because their enrollment was procured by fraud. This element of fraud distinguishes this case from *Garfield* v. *Goldsby*, 211 U. S. 249–264.

By their demurrer, upon which they have elected finally to stand, relators admit the allegation of fraud, as well as that they are not members of the Cherokee Nation. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257.

A court of law, following the rule in equity, will not lend its aid by the extraordinary writ of mandamus to enforce rights fraudulently acquired. High's Ex. Remedies, § 26; Merrill on Mandamus, §§ 68–72; 2 Spelling on Injunction, §§ 1371, 1380; *People* v. *Assessors*, 137 N. Y. 201; *People* v. *Jeroloman*, 139 N. Y. 14. See also to the same effect: *Commonwealth* v. *Henry*, 49 Pa. St. 530, 538; *State* v. *Commissioners of Phillips Co.*, 26 Kansas, 419; *State* v. *Graves*, 19 Maryland, 351; *Macoupin County* v. *The People*, 58 Illinois, 191; *People* v. *Ketcham*, 72 Illinois, 212; *Borough of Ansonia* v. *Studley*, 67 Connecticut, 170; *People* v. *Judge of Superior Court*, 41 Michigan, 31; *State* v. *Jersey City*, 42 N. J. Law, 94; *State* v. *Home Street Ry. Co.*, 43 Nebraska, 830.

It is unnecessary to consider whether relators had sufficient opportunity to be heard in the cancellation proceedings. Having, by their demurrer, admitted that their enrollment was procured by fraud, and having elected to stand thereon, they are not entitled to the extraordinary writ of mandamus in enforcing any rights so secured, to the injury of the Cherokee Nation.

Memorandum opinion by direction of the court. By Mr. Justice Lamar.

1. Where, under the provisions of acts of Congress, and after a hearing, the names of relators were duly entered as Creek Freedmen by blood on the rolls made and approved by the Secretary of the Interior, rights were acquired of which the freedmen could not be deprived without that character of notice and opportunity to be heard essential to due process of law. *Garfield* v. *Goldsby*, 211 U. S. 249.

2. Notice to the attorney of such freedmen, given a few hours before the hearing of a motion to strike their names, on the ground that their enrollment had been secured by perjury, was not such notice as afforded due process.

Roller v. *Holly*, 176 U. S. 399, 409; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701, 708; *Iowa Central Railway Co.* v. *Iowa*, 160 U. S. 389, 393; *Hovey* v. *Elliott*, 167 U. S. 409, 414.

3. In the absence of other controlling facts, the Secretary of the Interior could have been required by mandamus to restore the names of those thus arbitrarily stricken off without notice. *Garfield* v. *Goldsby*, 211 U. S. 249.

4. But mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.

5. Although the petition for the writ alleged that relators were freedmen duly enrolled and denied the truth of the testimony on which their names were stricken off, yet where the answer of the Secretary referred to that testimony and alleged, "on information and belief, that the relators were not freedmen members or members by blood or marriage of the Creek Nation, and that their enrollment had been procured by fraud," a defense was stated, proof of which would have defeated the right to a restoration of relators' names, even though they had been improperly stricken from the rolls without due process. *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636, 646; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257.

6. Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257.

7. To have issued the writ would have involved the useless thing of requiring relators' names to be reëntered, and in other proceedings having their names stricken because the original enrollment had been procured by fraud, thus admitted by the demurrer.

Affirmed.